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# *American Journal of International Law*

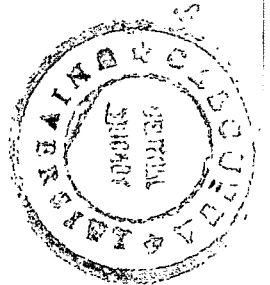
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P3514

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VOL. 79

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July 1985

NO. 3

Am 35

CONTENTS

108

PAGE

### The First ICJ Chamber Experiment

The Gulf of Maine Case: The Nature of an Equitable Result

Jan Schneider 539

Some Perspectives on Adjudicating before the World Court: The Gulf of Maine Case

Davis R. Robinson, David A. Colson & Bruce C. Rashkow 578

### New International Law in National Systems

Community Law, International Law and the Italian Constitution

Antonio La Pergola & Patrick Del Duca 598

Federalism and the International Legal Order: Recent

Developments in Australia Andrew Byrnes & Hilary Charlesworth 622

### Editorial Comments

The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience

Rosalyn Higgins 641

Nicaragua v. United States as a Precedent

Frederic L. Kirgis, Jr. 652

Nicaragua and International Law: The "Academic" and the "Real"

Anthony D'Amato 657

Reform of Lawmaking in the United Nations: The Human Rights

Instance

Theodor Meron 664

### Notes and Comments

Nicaragua v. United States: Constitutionality of U.S. Modification of ICJ Jurisdiction

Michael J. Glennon 682

Title and Use (and Usufruct)—An Ancient Distinction Too Oft

Forgot

L. F. E. Goldie 689

Correspondence

714

The Francis Deák Prize

720

### Contemporary Practice of the United States Relating to International Law

Marian Nash Leigh 722

### Judicial Decisions

Monroe Leigh 733

### Current Developments

The Thirty-sixth Session of the International Law Commission

Stephen C. McCaffrey 755

Proposed Amendment of the Foreign Sovereign Immunities Act

Timothy B. Atkeson & Stephen D. Ramsey 770

### Book Reviews and Notes

Edited by Leo Gross

Spencer, John H. *Ethiopia at Bay: A Personal Account of the Haile Sellassie Years* (Inis L. Claude, Jr.)

790

Bos, Maarten. *A Methodology of International Law* (Harry H. Almond, Jr.)

793

Góralczyk, Wojciech. *Prawo międzynarodowe publiczne w zarysie* (Richard Szawłowski)

794

Von Schönfeld, Ulrich. *Die Staatenimmunität im amerikanischen und englischen Recht* (Hans-Ernst Folz)

796

Sinclair, Ian. *The Vienna Convention on the Law of Treaties* (2d ed.) (Elisabeth Zoller)

799

Pogany, István S. *The Security Council and the Arab-Israeli Conflict* (Allan Gerson)

801

Kim, Samuel S. *The Quest for a Just World Order* (Frankie Fook-Lun Leung)

802

Grewe, Wilhelm G. <i>Epochen der Völkerrechtsgeschichte</i> (Bardo Fassbender)	803
Delbrück, Jost (ed.). <i>Friedensdokumente aus fünf Jahrhunderten</i> . 2 vols. (Benjamin B. Ferencz)	805
Butler, William E. (comp./trans./ed.). <i>The USSR, Eastern Europe and the Development of the Law of the Sea</i> (John N. Hazard)	807
Ginsburgs, George. <i>The Citizenship Law of the USSR</i> (John N. Hazard)	807
<i>The Lawfulness of Deep Seabed Mining</i> . 3 vols. Vols. I and II by Theodore G. Kronmiller; vol. III by Theodore G. Kronmiller and G. Wayne Smith (G. Plant)	809
<i>Experiences in the Development and Management of International River and Lake Basins</i> (Ludwik A. Teclaff)	811
Lillich, Richard B. <i>The Human Rights of Aliens in Contemporary International Law</i> (Rita E. Hauser)	812
Buergethal, Thomas, Robert Norris and Dinah Shelton. <i>Protecting Human Rights in the Americas</i> (James P. Rowles)	813
Bernhardt, Rudolf, Wilhelm Karl Geck, Günther Jaenicke and Helmut Steinberger (eds.). <i>Völkerrecht als Rechtsordnung—internationale Gerichtsbarkeit—Menschenrechte: Festschrift für Hermann Mosler</i> (Christina M. Cerna)	817
Pfänger, Friedbert. <i>Die Menschenrechtspolitik der USA</i> (Christina M. Cerna)	820
Michalska, Anna. <i>Prawa Człowieka w Systemie Norm Międzynarodowych</i> (Maria Frankowska)	821
Rendell, Robert S. (ed.). <i>International Financial Law</i> (2d ed.). 2 vols. (Don Wallace, Jr.)	822
Hague Conference on Private International Law. <i>Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters</i> (Bruno A. Ristau)	824
Gruson, Michael, and Ralph Reisner (eds.). <i>Sovereign Lending: Managing Legal Risk</i> (Robert S. Rendell)	826
Shihata, Ibrahim F. I., Said Aissi, Mehdi Ali, A. Benamara, Antonio R. Parra and T. Wohlers-Scharf (eds.). <i>The OPEC Fund for International Development: The Formative Years</i> (Duncan H. Cameron)	827
Akinsanya, Adeoye A. <i>Multinationals in a Changing Environment</i> (James R. Silkenat)	829
Jain, Subhash C. <i>Nationalization of Foreign Property: A Study in North-South Dialogue</i> (P. Sreenivasa Rao)	830
Burdeau, Geneviève. <i>Die französischen Verstaatlichungen</i> (Eberhard H. Röhm)	831
Kerse, C. S. <i>EEC Antitrust Procedure. Supplement 1984</i> (Joseph P. Griffin)	834
Sobrino Heredia, José Manuel. <i>La Situación regional en las Comuridades Europeas: Perspectivas para Galicia</i> (W. H. Balekjian)	835
Swann, Dennis. <i>Competition and Industrial Policy in the European Community</i> (W. H. Balekjian)	836
Toepke, Utz. <i>EEC Competition Law: Business Issues and Legal Principles in Common Market Antitrust Cases</i> (John R. Lacey)	837
Pryles, Michael, and Kazuo Iwasaki. <i>Dispute Resolution in Australia-Japan Transactions</i> (Keith D. Suter)	838
Andrés Sáenz de Santa María, M. Paz. <i>El Arbitraje Internacional en la Práctica Convencional Española (1794-1978)</i> (David D. Caron)	839
Hirsch, Martin, Diemut Majer and Jürgen Meinck (eds.). <i>Recht, Verwaltung und Justiz im Nationalsozialismus</i> (Benjamin B. Ferencz)	841
Friedlander, Robert A. <i>Terrorism: Documents of International and Local Control</i> . Vol. IV (Harry H. Almond, Jr.)	842
Stein, Torsten. <i>Die Auslieferungsausnahme bei politischen Delikten</i> (Don Berger)	843
Blishchenko, I. P. <i>Obychnoe Oruzhie: Mezhdunarodnoe Pravo</i> (John N. Hazard)	845
Bator, Paul M. <i>The International Trade in Art</i> (William D. Rogers)	847
Wolf, Maurice, and Elting Arnold. <i>Doing Business with the International Development Organizations in Washington, D.C.</i> (Anne M. Williams)	847
Klimenko, B. M., V. F. Petrovskij and Ju. M. Rybakov (eds.). <i>Slvoar Mezhdunarodnogo Prava</i> (Richard Szawlowski)	849
<i>Selected Articles from Chinese Yearbook of International Law</i> (Vratislav Pechota)	851
Rigaldies, Francis, and Daniel Turp (eds.). <i>Documents juridiques internationaux</i> (Marilou M. Righini)	855
Crawford, James, and David Flint (eds.). <i>Australian International Law News</i> (Marilou M. Righini)	855
<i>South African Yearbook of International Law</i> . Vols. 7, 1981 and 8, 1982 (Natalie Kaufman Hevener)	856
<i>Foreign Relations of the United States, 1952-1954, Volume I: General: Economic and Political Matters</i> . 2 parts (Elmer Plischke)	857
El Sheikh, Fath El Rahman Abdalla. <i>The Legal Regime of Foreign Private Investment in the Sudan and Saudi Arabia</i> (Ann Elizabeth Mayer)	860
<b>Briefer Notices:</b> Hazard, 861; Herzog (ed.), 862; Hooke (ed.), 863.	
<b>Books Received</b>	863
<b>International Legal Materials.</b> Contents, Vol. XXIV, No. 2 (March 1985)	868

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## THE GULF OF MAINE CASE: THE NATURE OF AN EQUITABLE RESULT

By Jan Schneider\*

Pursuant to the recent four to one Judgment by a Chamber of the International Court of Justice in the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*,<sup>1</sup> Canada and the United States are to share Georges Bank. Canada has jurisdiction over approximately one-sixth of the Bank, including the resource-rich "Northeast Peak" and most of the "Northern Edge," and the United States the remaining area. Since Georges Bank is one of the world's most productive fishing grounds, and this was consequently a case about fish more than a traditional continental shelf delimitation, the Judgment means that these North American neighbors may have to work out cooperative arrangements for the conservation and management of the shared living resources of Georges Bank. The question naturally arises as to how this outcome was reached, and why it purports to fulfill the fundamental norm of the law of delimitation of maritime boundaries—namely, to achieve an "equitable result."<sup>2</sup>

\* Of the New York and District of Columbia Bars. The author served as a legal adviser to Canada during the *Gulf of Maine* proceedings. The views expressed in this article, however, are solely her own and do not necessarily reflect Canadian views.

Between the oral proceedings and the Judgment in the *Gulf of Maine* case, Professor Antonio Malintoppi, who served as Counsel for Canada, passed away. This would be a suitable occasion to offer at least a small measure of acknowledgment of his most valuable and noteworthy contribution to the law of maritime boundary delimitation and to international law generally.

The author also wishes to acknowledge with appreciation the assistance of Cmdr. E. J. Cooper, who prepared the maps, and of Valerie Hughes, of the Ontario Bar, and Paul R. Berger, of the District of Columbia Bar, in the preparation of this article.

<sup>1</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12), reprinted in 23 ILM 1197 (1984) [hereinafter cited as GOM].

<sup>2</sup> In the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 ICJ REP. 18, 59 (Judgment of Feb. 24), reprinted in 21 ILM 225 (1982), the Court set the standard, stressing that it is the equitable character of the result that is predominant. More fully, the Court explained (*id.*):

Since the Court considers that it is bound to decide the case on the basis of equitable principles, it must first examine what such principles entail. . . . The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.

While both Governments have been deliberately restrained in their characterization of the Chamber's Judgment, their national press has been somewhat less cautious. The *Washington Post*, for example, carried a front-page article announcing the Judgment under the headline "World Court Bars U.S. Claim to Ocean Bank," while Canada's *Globe and Mail* reported on page one that "Ottawa Satisfied as World Court Sets Gulf Boundary."<sup>3</sup> Having initially reported that "World Court Settles Dispute on U.S.-Canada Boundary," the *New York Times* followed this up the next day with an article entitled "U.S. Fish Harvest Held Hurt By Court Boundary Decision"; and, a week or so later, it supplemented this account with back-to-back reports headlined "New Englanders Protesting Loss of Fishing Area" and "Nova Scotia Is Not Overjoyed by Its Fishing Share."<sup>4</sup> So, at least from these press accounts, one got the impression that the result was better received north of the border, and that while New England and particularly Massachusetts fishermen were highly distressed, their Nova Scotian counterparts were simply "not overjoyed."

This first impression was probably reinforced when, after several weeks of review, the U.S. fishing industry's North Atlantic Fisheries Task Force asked the Department of State to request that Canada agree to a 1-year moratorium on enforcement of fisheries laws in the former disputed area. After receiving such a letter from the New England senators and congressmen affected, the State Department did formally make the request of the Canadian Government in December 1984. To no one's surprise, however, Canada did not welcome the moratorium proposal.<sup>5</sup>

Yet the press accounts and moratorium proposal must be viewed in context. It is unquestionable that the United States had less to lose in the *Gulf of Maine* proceedings than Canada, since more than half of Georges Bank belonged to the United States whatever the outcome of the case. It is perhaps for this reason that the United States felt that it could afford to maintain throughout the proceedings that the whole of Georges Bank, in the words of the Agent of the United States, Davis R. Robinson, was as "American as apple pie."<sup>6</sup> Since the United States sought the whole of

<sup>3</sup> *World Court Bars U.S. Claim to Ocean Bank*, Wash. Post, Oct. 13, 1984, at A1, col. 1; Little, *Ottawa Satisfied as World Court Sets Gulf Boundary*, *Globe & Mail*, Oct. 13, 1984, at 1, col. 5. See also Simpson, *How History Is Made*, *Globe & Mail*, Oct. 13, 1984, at 6, col. 1.

<sup>4</sup> A New U.S. Border (box and map at 1, col. 1), and Bernstein, *World Court Settles Dispute on U.S.-Canada Boundary*, N.Y. Times, Oct. 13, 1984, at 3, col. 5; *U.S. Fish Harvest Held Hurt by Court Boundary Decision*, N.Y. Times, Oct. 14, 1984, §1, at 38, col. 1; Robbins, *New Englanders Protesting Loss of Fishing Area*, N.Y. Times, Oct. 22, 1984, at A1, col. 1; Martin, *Nova Scotia Is Not Overjoyed by Its Fishing Share*, N.Y. Times, Oct. 23, 1984, at A2, col. 3. See also Urquhart, *World Court's Award to Canada of a Sixth of Georges Bank Upsets New Englanders*, Wall St. J., Oct. 15, 1984, at 7, col. 1.

<sup>5</sup> For discussion, see Nautilus, OCEAN SCI. NEWS, No. 44, Nov. 26, 1984, at 1-3.

<sup>6</sup> Davis R. Robinson, the Agent of the United States, is also the Legal Adviser of the U.S. Department of State. Similarly, the Canadian Agent, Leonard H. J. Legault, Q.C., is the Legal Adviser of the Canadian Department of External Affairs.

Both parties were represented by highly distinguished counsel and advisers too numerous to list here. It might be mentioned, however, that the proceedings were opened on behalf of Canada by the then Minister of Justice and Attorney General of Canada, Mark MacGuigan, P.C., Q.C., M.P.

the Bank, with essentially no fallback position, anything short of a complete monopoly of the Georges Bank fishery was bound to be viewed as something of a "defeat."

Canada, on the other hand, sought a large enough slice of Georges Bank to protect its existing fishery. Accordingly, while maintaining its boundary claim of an "equitable" equidistance line (disregarding Cape Cod and Nantucket Island), Canada made reference to a number of other equidistance lines ranging progressively northeastward. Thus, any boundary that put Canada palpably on the Bank, protecting a large part of its existing scallop fishery and offering substantial ground-fish resources, was bound to be viewed as something of a "victory" for Canada.

But is this a fair assessment of the result of the *Gulf of Maine* case? Simply looking at the resulting boundary on Map No. 4 of the Judgment (see map 1, p. 542) has led some observers to suggest that the Chamber simply "split the difference" between the United States and Canadian claims, in a manner somewhat favorable to Canada; and an initial reading of the Judgment may not clarify the bases for the Chamber's decision. To understand the opinion more fully and to assess the new boundary, perhaps one needs to have a clearer view of the positions put forward by the parties. To that end, the present article will be divided into three parts: first, there will be a brief description of the nature of the proceedings and the issues before the Chamber; second, the main components of the U.S. and Canadian positions will be identified and compared; and third, an attempt will be made to review the Judgment in the light of this essential background. A few final thoughts will be added about the implications of the *Georges Bank* case, not only for the three remaining unresolved maritime boundaries between the United States and Canada, but also for bilateral cooperation generally.<sup>7</sup>

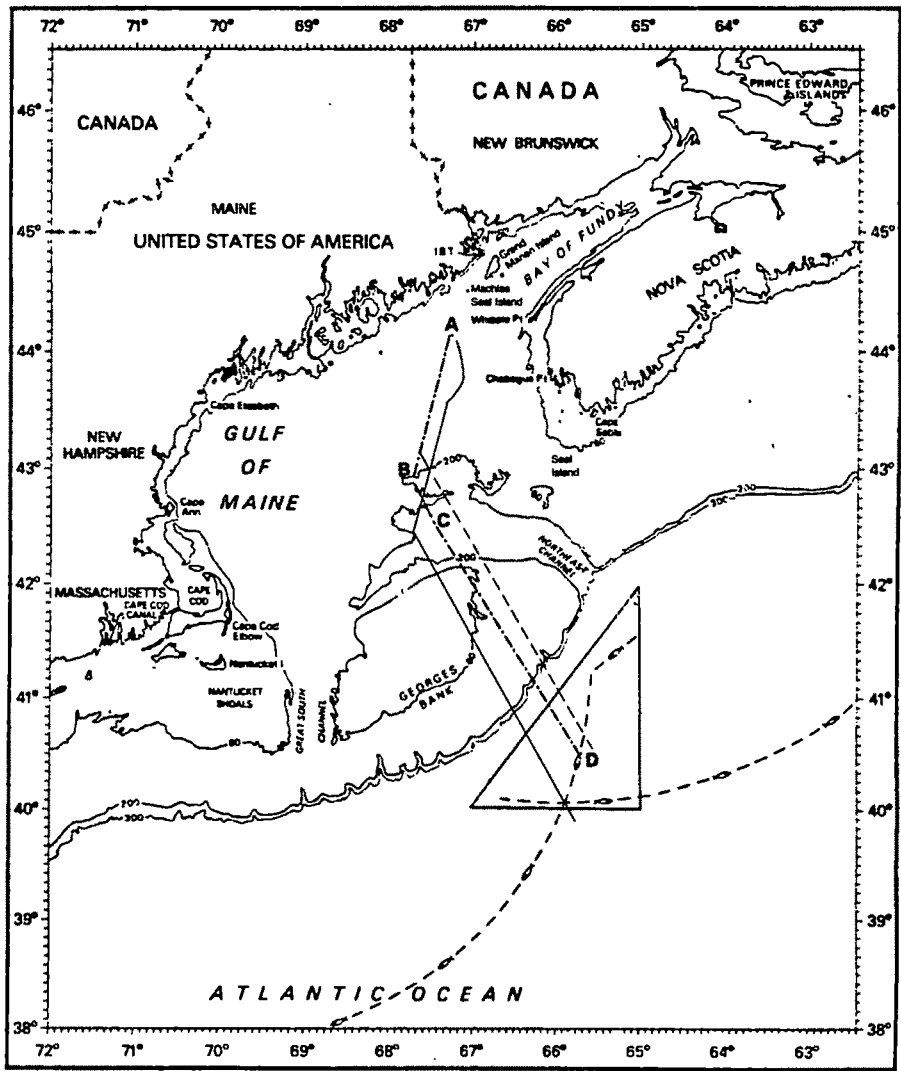
### I. THE *GULF OF MAINE* PROCEEDINGS

The *Gulf of Maine* case was procedurally innovative, making use for the first time of the "Chambers" procedure provided for in the Statute and Rules of the International Court of Justice. More important, the case was a substantive landmark, being the first third-party settlement of a "single maritime boundary" for both the continental shelf and the resources of the water column, which is expected to become more common with the advent of exclusive economic zones around the world. In addition, *Gulf of Maine* was unprecedented in proceedings before the International Court in that the parties asked for the drawing of an actual boundary line, rather

<sup>7</sup> The United States and Canada have not fixed their two maritime boundaries on the West Coast, between Alaska and British Columbia and between British Columbia and Washington, out to 200 miles and beyond. Nor have they agreed on a boundary in the Arctic in the Beaufort Sea area. In addition, if one counts the inner and outer segments of the Gulf of Maine boundary still to be determined, and their dispute concerning sovereignty over Machias Seal Island in the Gulf of Maine, Canada and the United States could be said to have five remaining unresolved maritime boundary issues plus a territorial dispute.

MAP 1

THE GULF OF MAINE CASE: THE ICJ CHAMBER'S BOUNDARY LINE



- KEY
- Boundary Drawn by the Chamber
  - ..... Judge Schwebel's Line
  - Judge Gros's Line
  - IBT International Boundary Terminus
  - 200-mile Limit

than simply an indication of the principles and rules of international law applicable to the delimitation and clarification of the practical method for applying them.



*The Special Agreement*

First, to dispose of the procedural aspects, *Gulf of Maine* came to the World Court pursuant to the Special Agreement between Canada and the United States to Submit to a Chamber of the International Court of Justice the Delimitation of the Maritime Boundary in the Gulf of Maine Area (the *compromis* in this case). The Special Agreement was annexed to the Treaty between Canada and the United States to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area. Both were signed March 29, 1979, and, as subsequently altered, entered into force on November 20, 1980. The Boundary Treaty was itself one of a pair of treaties, the other being the Agreement on East Coast Fishery Resources, which was also signed the same day but never entered into force.<sup>8</sup>

Five members were named to this first Chamber of the ICJ.<sup>9</sup> Judge Roberto Ago (Italy) served as its President. Judge André Gros (France), whose term on the ICJ ended before the conclusion of the proceedings in the *Gulf of Maine* case, and Judge Hermann Mosler (Federal Republic of Germany) were also members. The other two were Judge Stephen Schwebel (United States) and, since Canada does not currently have a national on the World Court, Judge *ad hoc* Maxwell Cohen (Canada).

According to the Special Agreement, the Chamber was asked to decide "the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States" from a point (Point A) nearly 40 nautical miles southwest of the international boundary terminus in Grand Manan Channel to a point within a triangle encompassing the terminal points of the boundary lines claimed by both parties and the intersection of the 200-mile arcs used to determine the outer limits of their continental shelf and fisheries jurisdictions.<sup>10</sup> Point A and the triangle were depicted in Map No. 1 of the Judgment (see map 1, facing page).

The Special Agreement further provided that the single maritime boundary was to serve for all recognized jurisdictional purposes, i.e., that on each other's side the United States and Canada shall not "claim or

<sup>8</sup> The Boundary Treaty, as it entered into force Nov. 20, 1980, is found at TIAS No. 10204. The Boundary Treaty and its annexed Special Agreement are found in the United States Memorial [hereinafter cited as U.S. Mem.], 1 Annexes, Ann. 2, and the latter is reprinted in full in the Canadian Memorial [hereinafter Can. Mem.] at 3-6 and GOM, para. 5.

For the East Coast Fishery Resources Agreement, Mar. 29, 1979, S. EXEC. DOC. V, 96th Cong., 1st Sess. (1979), see Can. Mem., 1 Annexes, Ann. 20.

<sup>9</sup> Article 1 of the Special Agreement, *supra* note 8, provided that the question posed was to be submitted "to a Chamber of the International Court of Justice, composed of five persons, to be constituted after consultation with the Parties, pursuant to Article 26(2) and Article 31 of the Statute of the Court and in accordance with this Special Agreement." See GOM, para. 3.

<sup>10</sup> Special Agreement, *supra* note 8, Art. II(1). Point A was at lat. 44°11'12" N, long. 67°16'46" W. The triangle was determined by straight lines connecting the following sets of points: lat. 40° N, long. 67° W; lat. 40° N, long. 65° W; lat. 42° N, long. 65° W. See GOM, para. 15.

exercise sovereign rights or jurisdiction for any purpose over the waters or seabed and subsoil."<sup>11</sup> The parties also expressly agreed that each of them "shall accept as final and binding upon them the decision of the Chamber" on the course of their single maritime boundary.<sup>12</sup> Consequently, the Judgment recently rendered in the *Gulf of Maine* case does not require any further action by the United States Congress, in particular the Senate, or by the Canadian Parliament to fix the boundary for all jurisdictional purposes now and in the future.<sup>13</sup>

Pursuant to the Special Agreement and Orders of the Court and the President of the Chamber, Canada and the United States simultaneously exchanged three sets of written pleadings: Memorials on September 27, 1982; Counter-Memorials on June 28, 1983; and Replies on December 12, 1983.<sup>14</sup> Two rounds of oral proceedings took place between April 2 and May 11, 1984, with Canada, having lost a coin toss, going first.

In the Special Agreement, provision was made for the Chamber to appoint a technical expert nominated jointly by the parties to assist in technical matters, and Commander Peter Beazley (United Kingdom) was selected to render such assistance.<sup>15</sup> Otherwise, the Chamber mostly followed the usual rules and procedures of the full Court. There was one useful innovation: the judges posed various questions to one or both parties at the end of the first round of oral proceedings instead of at their close, and the parties addressed these questions during the second round.<sup>16</sup>

### *The Single Maritime Boundary*

The truly novel feature of the *Gulf of Maine* case was its substance: the delimitation of a single maritime boundary.<sup>17</sup> This made it, in the words of the United States Memorial, a case of "first impression."<sup>18</sup> A second major feature distinguishing the *Gulf of Maine* from previous cases before the International Court of Justice—i.e., the *North Sea Continental Shelf Cases*<sup>19</sup> and the *Tunisia/Libya Continental Shelf case*<sup>20</sup>—was the fact that

<sup>11</sup> Special Agreement, *supra* note 8, Art. III(1). See GOM, para. 16.

<sup>12</sup> Special Agreement, *supra* note 8, Art. II(4). See GOM, para. 16.

<sup>13</sup> See ICJ Doc. C 1/CR 84/24, at 61-62 (May 9, 1984). Hereinafter these documents of the oral proceedings will be referred to simply by the Court's identification; as the year is included in that identification, it will not be repeated.

<sup>14</sup> See Special Agreement, *supra* note 8, Art. VI.

<sup>15</sup> *Id.*, Art. II(3). Commander Beazley is an expert hydrographer who served on the UK delegation to the Third United Nations Conference on the Law of the Sea. See GOM, para. 8. He was present during most of the oral proceedings in the *Gulf of Maine* case and was available for subsequent consultations with the Chamber. A Technical Report by Commander Beazley is appended to the Judgment of the Chamber.

<sup>16</sup> See C 1/CR 84/17, at 61-76 (Apr. 19). See also GOM, para. 10.

<sup>17</sup> See *supra* text at note 11.

<sup>18</sup> U.S. Mem. at 3. All references to pleadings herein are to page numbers of the original pleadings.

<sup>19</sup> North Sea Continental Shelf Cases (FRG/Den.; FRG/Ice.), 1969 ICJ REP. 3 (Judgment of Feb. 20).

<sup>20</sup> 1982 ICJ REP. 18.

both Canada and the United States are parties to the 1958 Convention on the Continental Shelf,<sup>21</sup> which brought into contention the "equidistance/special circumstances" rule of Article 6.<sup>22</sup> In this respect, the *Gulf of Maine* case had as its sole possibly relevant precedent the *Anglo-French Continental Shelf* award.<sup>23</sup>

The central problem of delimitation of a single maritime boundary dividing both the continental shelf and the various water column jurisdictions of the fisheries zone or exclusive economic zone potentially confronted the Chamber with a kind of legal schizophrenia. What if the traditional principles of continental shelf delimitation indicated a result different from that which appeared to be suggested by the legal principles governing the new 200-mile zones? And what if different methods seemed appropriate for different areas of the delimitation, e.g., the inner area of the Gulf of Maine proper and the outer area in the open Atlantic?<sup>24</sup> This essential problem was raised directly by the President of the Chamber, Judge Ago, in a question posed to both sides between the two rounds of oral proceedings:

In the event that one particular method, or set of methods, should appear appropriate for the delimitation of the continental shelf, and

<sup>21</sup> Convention on the Continental Shelf, done Apr. 29, 1958, 15 UST 471, TIAS No. 5578, 499 UNTS 311. See GOM, paras. 84-90, 116-125, 167.

<sup>22</sup> Article 6 of the Continental Shelf Convention, *id.*, provides in pertinent part:

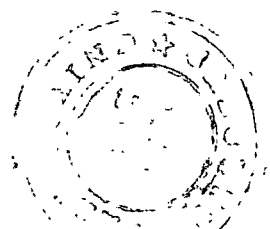
1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

<sup>23</sup> Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decisions of 30 June 1977 and 14 March 1978, 18 R. Int'l Arb. Awards 3, 18 ILM 397 (1979).

<sup>24</sup> The United States and Canada agreed early on that the notional or hypothetical closing line for the Gulf of Maine should be drawn from Nantucket Island to Cape Sable. See, e.g., U.S. Mem. at 19 n.2, 173; United States Counter-Memorial [hereinafter cited as U.S. C.-Mem.] at 13 n.2, 21 n.2, 22 n.1, 184 and figs. 21, 36 and 38; United States Reply [hereinafter U.S. Rep.] at 119; Canadian Counter-Memorial [hereinafter Can. C.-Mem.] at 50-52, 297, figs. 12 and 51; Canadian Reply [hereinafter Can. Rep.] at 61. When specifically asked by Judge Mosler about the appropriateness of this closing line, C 1/CR 84/17, at 71 (Apr. 19), both parties continued to adhere to it. See C 1/CR 84/20, at 34-35 (May 4); C 1/CR 84/25, at 8, 62-63 (May 10). See also C 1/CR 84/1, at 76 (Apr. 2); C 1/CR 84/2, at 56 (Apr. 3); C 1/CR 84/11, at 19 (Apr. 12).

The Chamber accepted this closing line as the boundary between the inner, or true Gulf of Maine zone, and the outer, or Atlantic zone, of the delimitation. See GOM, para. 33.



another for that of the exclusive fishery zones, what do the Parties consider to be the legal grounds that might be invoked for preferring one or the other in seeking to determine a single line?<sup>25</sup>

The responses of the parties to this question were quite different, reflecting widely divergent views of the basic nature of the case, as will be discussed below. The Chamber arrived at very different views from both of them.

## II. POSITIONS OF THE PARTIES

Both parties purported to start from the same fundamental legal norm: delimitation "in accordance with equitable principles, taking account of the relevant circumstances in the area, to produce an equitable solution."<sup>26</sup> A basic difference between their approaches, however, related to the breadth of their frames of reference for assessing equitable principles. The United States based its case on comparisons of continental or national scale. Canada, on the other hand, focused specifically and narrowly on the particular circumstances of the Gulf of Maine area.

The boundary lines claimed by the parties were also far apart. The two Governments declared 200-mile fishing zones within months of each other: the United States in the Magnuson Fishery Conservation and Management Act of 1976,<sup>27</sup> and Canada by Order-in-Council shortly thereafter.<sup>28</sup> The Canadian Order-in-Council, published in the *Canada Gazette*, included geographical coordinates showing a fishing zone extending to a strict equidistance line on Georges Bank. Virtually simultaneously, the United States published a notice in the *Federal Register* setting forth coordinates defining as the lateral limit of its fishing zone a line proceeding from seabed depression to seabed depression in the inner Gulf of Maine and then down the center of the Northeast Channel.<sup>29</sup> The claims of the parties as they stood in early 1977 are illustrated in Map No. 2 of the *Gulf of Maine Judgment* (see map 2, facing page).

<sup>25</sup> C 1/CR 84/17, at 62 (Apr. 19), *quoted in* GOM, para. 161.

<sup>26</sup> U.S. Mem. at 139. Canada used a virtually identical formula: "in accordance with equitable principles, taking account of all the relevant circumstances, in order to achieve an equitable result." Can. Mem. at 119. *See also* GOM, paras. 98-99. For present purposes, there can be left to metaphysics the difference between an "equitable solution" and an "equitable result."

<sup>27</sup> Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §1801 *et seq.* (1982)). The Magnuson Act is found at U.S. Mem., 1 Annexes, Ann. 8. It came into effect on Mar. 1, 1977.

<sup>28</sup> Proposed Fishing Zones of Canada (Zones 4 and 5) Order, 110 Can. Gaz., pt. 1, Extra, No. 101 (Nov. 1, 1976). The Canadian Order-in-Council is found at Can. Mem., 2 Annexes, Ann. 29. The Canadian 200-mile fishing zone actually came into being before that of the United States, on Jan. 1, 1977. *See note 30 infra.*

<sup>29</sup> Maritime Boundaries of the United States and Canada, 41 Fed. Reg. 18,619 (1976). This notice is found at U.S. Mem., 4 Annexes, Ann. 64.



from the Massachusetts mainland.<sup>30</sup> It was not until the Memorial stage in the *Gulf of Maine* proceedings that the United States put forward its own new line. The U.S. and Canadian claims as proposed before the Chamber are illustrated in Map No. 3 of the Judgment (see map 2).

The United States declared an exclusive economic zone on March 10, 1983. President Reagan's proclamation of the U.S. zone declared that its boundaries "shall be determined by the United States and other State concerned in accordance with equitable principles."<sup>31</sup> Neither party contended that this proclamation affected the law in *Gulf of Maine*.

### *The United States Case*

The new U.S. line put forward in the United States Memorial was said to be "perpendicular to the general direction of the coast" at the land boundary or the international boundary terminus, "as adjusted to take account of the relevant circumstances in the area."<sup>32</sup> This "adjusted perpendicular line" (dubbed by Canada a "wandering perpendiculars line") was consistent with the prior U.S. claim to the whole of Georges Bank, but expanded the U.S. claim in front of the coast of Maine. The line would "intersect the Nova Scotia peninsula" if it were not "adjusted to take account of Nova Scotia," and as it was, the new line passed within 25 nautical miles of Yarmouth, Nova Scotia.

The United States predicated its claim to the whole of Georges Bank on four grounds, alleged to be "equitable principles," involving: (1) the relationship between the coasts of the parties and the maritime areas in front of those coasts; (2) resource conservation and management; (3) minimizing the potential for international disputes; and (4) the relevant circumstances of the area.<sup>33</sup> These were supplemented by, or came under the umbrella of, a broad claim by the United States of "dominance," "complete dominance" or "predominant interest"—its own words—over the entire Gulf of Maine area, based upon a number of factors relating to defense, navigation, and search and rescue activities.<sup>34</sup>

<sup>30</sup> 112 Can. Gaz., Extra, No. 79 (Sept. 15, 1978), found at Can. Mem., 2 Annexes, Ann. 41.

<sup>31</sup> Exclusive Economic Zone of the United States of America, Proc. No. 5030, Mar. 10, 1983, 48 Fed. Reg. 10,605 (1983). The U.S. proclamation, and accompanying Statement by the President, Fact Sheet and Sketch Map, are found at Can. C-Mem., 4 Annexes, Ann. I. Canadian Note No. 160 on the subject of the U.S. declaration of an EEZ is found at *id.*, Ann. 2.

<sup>32</sup> U.S. Mem. at 179. The two terms are not the same. The last major segment of the land boundary between Maine and New Brunswick is a line running directly north/south along long. 67°47' W. From the terminal point of this "due north" line, the boundary takes a south-by-southeasterly direction along the course of the St. Croix River, between U.S. and Canadian islands in Passamaquoddy Bay, and then down the Grand Manan Channel to the international boundary terminus at a point equidistant (3 miles) from both coasts. See GOM, para. 30.

<sup>33</sup> See U.S. Mem. at 140-47, 213; U.S. C-Mem. at 269; U.S. Rep. at 75-88, 165; C 1/CR 84/26, at 68 (May 11).

<sup>34</sup> This claim of "dominance" was maintained by the United States from beginning to end of the proceedings. See, e.g., U.S. Mem. at 81-82:

1. *Perpendicular "Seaward Extensions" of "Primary" Coasts.* The first U.S. principle—that the boundary must reflect the relationship between the coasts of the parties and the maritime areas in front of those coasts—was essentially based on an argument of nonencroachment or "cutoff." Although the U.S. Northeast Channel line of 1976 had swung closer to the Maine coast than the Canadian equidistance claim, after promulgating its new line, the United States argued that the Canadian line would cut off the "seaward extension" of the United States coasts of Maine and New Hampshire.<sup>35</sup>

The U.S. argument concerning appurtenance or "seaward extension" of coasts rested upon a distinction between "primary" and "secondary" coasts, and the notion of "perpendicular extension" of "primary" coasts. In this hierarchy, a coast parallel to an alleged overall general direction of the Atlantic coast of North America and of the relevant area was said to qualify as "primary," while coasts otherwise aligned were relegated to "secondary" status.<sup>36</sup> Thus, the United States claimed that the coasts of Maine and New Hampshire are "primary" and entitled to a perpendicular extension along an azimuth of 144 degrees out to the full limits of the U.S. exclusive economic zone and continental shelf.<sup>37</sup> Under this theory,

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No State questioned United States' jurisdiction and control over the continental shelf of the Gulf of Maine Basin and Georges Bank until the 1960s. Through that long period, all activities in this area—fishing, charting and surveying, scientific research, and defense—evidenced the complete dominance of the United States over it.

This same claim was still put forward during the oral proceedings, C 1/CR 84/10, at 60–61 (Apr. 12):

In this case, the United States predominant interest in a large number of both resource and resource-related activities outweighs Canada's recent interest in a scallop fishery on Georges Bank. In addition, the conduct of the Parties, taken as a whole, indicates that Canada's challenges to the United States predominant interest in Georges Bank and the area south of the Northeast Channel have been both relatively recent and relatively limited.

<sup>35</sup> See, e.g., U.S. Mem. at 191–92 and fig. 31; U.S. C.-Mem. at 184–93 and fig. 23; U.S. Rep. at 105–11; C 1/CR 84/11, at 49–66 (Apr. 12).

<sup>36</sup> The United States claimed that the general direction of the coast in the relevant area, like the general direction of the East Coast of North America, is along an azimuth of approximately 54°. See, e.g., U.S. Mem. at 170 and fig. 26; U.S. C.-Mem. at 17–18 and fig. 3; U.S. Rep. at 96–97; C 1/CR 84/11, at 22–24 (Apr. 12). While contending that a macro-geographical general direction is irrelevant, Canada noted that the North American coast changes its general direction in the vicinity of Long Island, and that the macro-geographical general direction from Long Island to Cape Race is approximately 67°. See, e.g., Can. C.-Mem. at 40–41 and figs. 6 and 7.

On the distinction between "primary" and "secondary" coasts, see, e.g., U.S. Mem. at 19–20, 173–74; U.S. C.-Mem. at 23–25, 184–93; U.S. Rep. at 106–08, 146–48; C 1/CR 84/11, at 26–27 (Apr. 12). See also *supra* note 35.

<sup>37</sup> On the U.S. claim that the general direction of the coast is 54° and the proper azimuth, therefore, 144°, see *supra* note 36; see also U.S. Mem. at 179 and fig. 28. The United States contended that this direction is confirmed by the direction of the last segment of the Maine-New Brunswick boundary, which was said to reach the sea at a bearing of approximately 151°. U.S. Rep. at 93–94 and fig. 6.

the United States contended that Georges Bank appertains to Maine and New Hampshire, rather than to Massachusetts and Nova Scotia.<sup>38</sup>

The United States claimed to rely on the *North Sea Continental Shelf Cases* for this theory of perpendicular extensions of primary coastal fronts. In particular, the United States made frequent reference to the maxim "the land dominates the sea,"<sup>39</sup> and pointed to the fact that the Court recognized "the appurtenance of the shelf to the countries in front of whose coastlines it lies."<sup>40</sup>

2. "Single-State Management" and the "Natural Boundary." The second equitable principle enunciated by the United States—that the boundary should facilitate resource conservation and management—rested essentially on two premises. First, the United States contended that a basic theme of the exclusive economic zone is management by a single state wherever possible, in order to facilitate conservation and minimize the potential for international disputes.<sup>41</sup> And second, the United States contended that there are "three separate and identifiable ecological regimes" in the Gulf of Maine area, with a "natural boundary" at the Northeast Channel.<sup>42</sup>

The concept of "single-State management," according to the United States, enjoys a preferred status under the law. The United States maintained that "the extension of fisheries jurisdiction to 200 nautical miles and the development of the exclusive economic zone constituted in part a response to difficulties engendered by joint management of resources."<sup>43</sup> Accordingly, it was argued that "[t]he new Law of the Sea Convention sets forth a general rule of exclusive management of fisheries by a single State whenever possible."<sup>44</sup>

The second U.S. contention regarding conservation and management, that there are three separate and identifiable ecological regimes in the Gulf of Maine area,<sup>45</sup> was said to apply also to the fishery resources of the area, with 12 out of the 16 commercial stocks showing a discontinuity at the Northeast Channel.<sup>46</sup> Thus, a single maritime boundary down the

<sup>38</sup> See U.S. Mem., fig. 31, repeated as U.S. C.-Mem., fig. 23 and U.S. Oral Proceedings, fig. 30.

<sup>39</sup> 1969 ICJ REP. at 51, quoted in *Tunisia/Libya case*, 1982 ICJ REP. at 61, and cited in, e.g., U.S. Mem. at 128, 140; U.S. C.-Mem. at 110, 136, 183, 189, 190, 265; U.S. Rep. at 64-65; C 1/CR 84/9, at 61-66 (Apr. 11); C 1/CR 84/24, at 48 (May 9).

<sup>40</sup> 1969 ICJ REP. at 51, cited in U.S. Rep. at 108. See also 1969 ICJ REP. at 32-33, quoted in U.S. Mem. at 140; U.S. C.-Mem. at 139; U.S. Rep. at 66; C 1/CR 84/11, at 32 (Apr. 12).

<sup>41</sup> See U.S. Mem. at 117-20, 142-43; U.S. C.-Mem. at 217-26; U.S. Rep. at 79-88; C 1/CR 84/10, at 16-21 (Apr. 12); C 1/CR 84/15, at 5-71 (Apr. 18); C 1/CR 84/16, at 5-32 (Apr. 18); C 1/CR 84/17, at 6-50 (Apr. 19); C 1/CR 84/26, at 16-45 (May 11).

<sup>42</sup> See U.S. Mem. at 27-39; U.S. C.-Mem. at 37-45, 197-206; U.S. Rep. at 121-37; C 1/CR 84/10, at 45-55 (Apr. 12). See also sources cited *supra* note 41.

<sup>43</sup> U.S. Rep. at 81, 82.

<sup>44</sup> *Id.* at 82.

<sup>45</sup> These regimes were said to be those of the Gulf of Maine Basin, Georges Bank and the Scotian Shelf. See U.S. Mem. at 27 *et seq.*; U.S. C.-Mem., Ann. 1; U.S. Rep. at 127. See also sources cited *supra* notes 41, 42.

<sup>46</sup> U.S. Mem. at 36 and fig. 7, 206 and fig. 36; U.S. C.-Mem. at 217-21; U.S. Rep. at



Northeast Channel would allegedly reflect a "natural boundary" between the stocks of Georges Bank and the stocks of the Scotian Shelf and make use of a "natural buffer zone" at the Northeast Channel.<sup>47</sup>

3. *Eliminating the Source of Disputes.* The third U.S. principle—that the boundary should minimize the potential for international disputes—was also supposed to be fulfilled by awarding the whole of Georges Bank to the United States. As the United States explained:

The conservation and management of the fish resources in the Gulf of Maine area have been particularly contentious and emotional issues for the United States and Canada. If the boundary line were to cut through most of the commercially important stocks in the area, then either United States fishing in its waters or Canadian fishing in its waters would affect the abundance of fish in the other State's portion of Georges Bank. The management of the Georges Bank fisheries would remain forever a potential source of disputes between the two States.<sup>48</sup>

In other words, as the United States summarized: "When there is a choice, and when it is otherwise equitable to do so, surely a boundary that would minimize international disputes should be chosen over one that would make them certain."<sup>49</sup>

4. *Relevant Circumstances.* The fourth U.S. principle—that the boundary must take account of the relevant circumstances in the area—was in itself noncontroversial. The law is clear that an evaluation of relevant circumstances is central to maritime boundary delimitation.

For its part, the United States identified four sets of geographical circumstances alleged to be relevant: (1) the location of the land boundary in the far northern corner of the Gulf of Maine; (2) the general direction of the coast in the Gulf of Maine area; (3) the coastal concavity that is the Gulf of Maine; and (4) the position of the Northeast Channel dividing the Scotian Shelf from Georges Bank.<sup>50</sup> The United States also alleged certain nongeographical circumstances to be relevant, including: (1) the role of the Northeast Channel as a "major geomorphological feature" in the Gulf of Maine area;<sup>51</sup> (2) the role of the Northeast Channel as a "natural

133; C 1/CR 84/13, at 59 (Apr. 16); C 1/CR 84/14, at 5-9 (Apr. 16); C 1/CR 84/17, at 15-22 (Apr. 19). According to the United States, the 16 species are: \*silver hake, \*herring, mackerel, \*haddock, \*cod, pollock, \*longfin squid, \*red hake, \*yellowtail flounder, shortfin squid, argentine, \*redfish, \*scallops, \*white hake, \*lobster and \*cusk (\* identifies species claimed by the United States to break at the Northeast Channel).

<sup>47</sup> U.S. Mem. at 35-39, 206. See also sources cited *supra* notes 42, 45-46.

<sup>48</sup> U.S. Rep. at 87.

<sup>49</sup> *Id.* at 88.

<sup>50</sup> *Id.* at 93-132. See also U.S. Mem. at 11-25 *et seq.*; U.S. C.-Mem. at 13-14, 183-206. At the stage of the oral proceedings, the United States separated out the following as additional relevant geographic circumstances: (1) the relationship of the parties' coasts to one another; (2) the comparability of the parties' coasts in relation to one another and in relation to the land boundary; and (3) the relationship of the Bay of Fundy to the relevant area, to the area in which the delimitation takes place and to the proportionality test area. C 1/CR 84/11, at 19 *et seq.* (Apr. 12). See also C 1/CR 84/25, at 6-28 (May 10).

<sup>51</sup> U.S. Rep. at 122-32. See also U.S. Mem. at 20-23; U.S. C.-Mem. at 28-29.

boundary" between ecological regimes, already discussed; and (3) a miscellaneous collection of other state activities. The last category included items as diverse as electronic aids to navigation, search and rescue regions, cartographical activities, defense arrangements during World War II, air defense zones, a "lobster line" and some others.<sup>52</sup>

5. *Historical Considerations.* Viewing the controversy from a historical perspective, the United States claimed that from the Truman Proclamation of 1945 declaring jurisdiction over the continental shelf forward, the United States has maintained that the Gulf of Maine boundary must be settled by agreement between the parties. The United States claimed that Georges Bank fell within the U.S. definition of its continental shelf at the time of the Truman Proclamation, and that subsequent U.S. behavior and claims were consistent with this understanding. In putting forward these arguments, the United States placed particular reliance on a reference to the 100-fathom depth contour in a press release accompanying the Truman Proclamation.<sup>53</sup>

6. *Determination of a Single Maritime Boundary.* As regards the question raised by Judge Ago concerning the new problems posed in determining a single maritime boundary rather than just a continental shelf boundary, the United States thought that

where one method appears under the fundamental rule to be the appropriate method for delimitation of the continental shelf, and another method appears appropriate for the exclusive fisheries zone, there appear to be no legal grounds that may be invoked *a priori* for preferring one or the other method in seeking to determine a single line.<sup>54</sup>

Instead, the applicable principles and relevant circumstances from which the appropriateness of the respective methods would follow individually should be considered as an "integrated whole." Choosing a method considered to be linked to either fisheries or the continental shelf "would . . . not be consonant with the transcending principle of taking into account the uniqueness or individuality of the facts in the particular case before the Tribunal."<sup>55</sup>

<sup>52</sup> U.S. Mem. at 63-87 and figs. 12-16. See also U.S. Rep. at 139-40; C 1/CR 84/10, at 50 (Apr. 12). The "lobster line" was a creature of the U.S. Bartlett Act, Pub. L. No. 88-308, 78 Stat. 194 (formerly codified at 16 U.S.C. §§1081-1085 (1964)); the United States enforced this line for a period of less than 15 months, but not against Canadian fishermen.

<sup>53</sup> See U.S. Rep. at 25-47; C 1/CR 84/9, at 13-18 (Apr. 11). The Truman Proclamation, 3 C.F.R. 67 (1943-48), and its accompanying press release are reprinted at U.S. Mem., I Annexes, Ann. 3. The United States did not contend that the reference in the press release to the 100-fathom depth contour constituted a U.S. boundary claim in the Gulf of Maine area. As the proclamation itself noted, the boundaries themselves would be established by agreement in accordance with equitable principles. Rather, the United States contended that the description of the U.S. continental shelf in the press release would not countenance a unilateral claim by Canada to any portion of Georges Bank, and Canada was put on notice of this. U.S. Rep. at 23 n.2; see also C 1/CR 84/9, *supra*, at 14.

<sup>54</sup> C 1/CR 84/24, at 19 (May 9). See generally *id.* at 19-23. See also GOM, para. 161.

<sup>55</sup> C 1/CR 84/24, at 20 (May 9).

The related position of the United States on Article 6 of the Convention on the Continental Shelf, as explained in response to another question from Judge Gros,<sup>56</sup> was that it was not binding on the Chamber because the Convention applies only to the continental shelf, and not to 200-mile fisheries zones or maritime zones relating to the exercise of other rights and jurisdiction.<sup>57</sup> As a result of recent developments in the jurisprudence, particularly the *Anglo-French* decision, the customary international law relating to delimitation of maritime boundaries has so evolved that essentially there is now a "single unified law rule" applicable to the continental shelf, fisheries and economic zones. This fundamental rule, according to the United States, embodies concepts that have been developed in the continental shelf cases, both where Article 6 was applicable and where it was not, but also taking account of the jurisprudence from fisheries delimitation cases. "Thus, in the United States view, it today makes very little difference whether Article 6 of the Convention is applicable as a matter of treaty law or merely as a source of customary law as reflected in the fundamental rule."<sup>58</sup>

7. *Law of the Sea*. Finally, while both parties sought some comfort at various stages in the new 1982 Convention on the Law of the Sea, it is worth mentioning that the United States placed considerable emphasis on their different stances concerning the law of the sea generally. Indeed, the opening chapter of the United States Reply, entitled "Many of the Disagreements Between the Parties in This Case Arise Out of, and Reflect, Their Different Attitudes Concerning the Law of the Sea," was entirely devoted to this subject. The chapter traced the history of the policies of the two states from the 1958 Conference on the Law of the Sea through the recent Third United Nations Conference on the Law of the Sea. The gist of the argument was that, while "Canada was a leading advocate of extensive fisheries jurisdiction for coastal States," the "United States sought to limit the seaward extension of coastal-State jurisdiction and to preserve the traditional freedoms of the high seas."<sup>59</sup> These "abiding differences" were said to have been carried forward to the recent Law of the Sea Conference and, eventually, to the negotiations that resulted in the "failed" 1979 bilateral fisheries agreement.

#### *The Canadian Case*

Canada, for its part, identified five propositions as fundamental to the application of equitable principles within the law:

<sup>56</sup> The question appears at C 1/CR 84/17, at 68 (Apr. 19). The U.S. reply is found at C 1/CR 84/24, at 10 (May 9). See generally *id.* at 10-19.

<sup>57</sup> Although acknowledging that "Article 6 would, of course, govern a delimitation between the Parties to that convention if the delimitation related only to the continental shelf," the United States maintained that "because the law relating to a single maritime boundary that also delimits fisheries or economic zones must be identified and applied in this case, the Continental Shelf Convention is not binding as a matter of treaty law." C 1/CR 84/24, at 11 (May 9).

<sup>58</sup> *Id.* at 13.

<sup>59</sup> U.S. Rep. at 13. See generally *id.* at 13-23.

- (a) Equitable principles must be identified and applied on the basis of the applicable law.
- (b) The boundary should respect the basis of coastal State title.
- (c) The boundary should respect the basic purposes of the rights and jurisdiction in issue.
- (d) The boundary should take account of legally relevant circumstances.
- (e) The result of the application of equitable principles must itself be equitable in light of all the relevant circumstances.<sup>60</sup>

Canada stressed the observation in the *Fisheries Jurisdiction* case that "[i]t is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law."<sup>61</sup> Two main sources of applicable law were identified by Canada in the *Gulf of Maine* case.

First, for the continental shelf, there was Article 6 of the Convention on the Continental Shelf and its application in the *Anglo-French* award. As was explained in response to Judge Ago's question about determining a single maritime boundary, Canada thought there were clearly legal grounds to guide the choice of the Chamber. Canada believed that "the appropriate legal approach to this question must stem from a recognition of the role of Article 6 of the 1958 Continental Shelf Convention," since "Article 6 is the only clear treaty provision that is applicable to this case and it is binding upon the Parties."<sup>62</sup> Canada also recalled that the *Gulf of Maine* dispute originated in the context of the continental shelf and claimed that the actions of the parties with respect to fisheries were consistent with their previous behavior in regard to the continental shelf.<sup>63</sup>

Second, while the rules of law for the delimitation of the water column

<sup>60</sup> Can. C.-Mem. at 227; Can. Rep. at 18. Canada also put forward three specific principles claimed to lead to an equitable result in this case:

- (a) In the geographical and other circumstances of this case, the boundary should leave to each Party the areas of the sea that are closest to its coast, provided that due account is taken of the distorting effects of particular geographical features in the relevant area.
- (b) The boundary should allow for the maintenance of established patterns of fishing that are of vital importance to coastal communities within the relevant area.
- (c) The boundary should respect the indicia of what the Parties themselves have considered equitable as revealed by their conduct.

Can. C.-Mem. at 252-53; C 1/CR 84/1, at 42 (Apr. 2).

<sup>61</sup> *Fisheries Jurisdiction Case (FRG v. Ice.)*, Merits, 1974 ICJ REP. 175, 202 (Judgment of July 25). See also Can. Mem. at 122; Can. C.-Mem. at 227; Can. Rep. at 18.

<sup>62</sup> C 1/CR 84/17, at 68 (Apr. 19); see generally *id.* at 34-39. See also GOM, para. 161.

<sup>63</sup> While Article 6 was as a matter of treaty law applicable only to the continental shelf, Canada reminded the Chamber that its equidistance-special circumstances rule had been described as a "particular expression of a general norm," and claimed that the conduct of both parties with respect to their fisheries zones indicated a shared assumption that the principles of Article 6 would apply to their delimitation as well. C 1/CR 84/17, at 35-36 (Apr. 19).

are less clearly defined, Canada maintained that the unity of the law respecting delimitation of the shelf and of the exclusive economic zone is reflected in the parallel wording of Articles 74 and 83 of the new Law of the Sea Convention.<sup>64</sup> In addition, Canada sought to draw two inferences from the basic principles of the exclusive economic zone. One of these was that the emergence of the zone, in which coastal state title is based upon the criterion of distance from the coast, gives a new importance to the factor of proximity in the delimitation of maritime boundaries at least within the 200-mile limit. The other was that, because economic considerations are central to the basic purpose of the new forms of maritime jurisdiction, a significant and established economic dependence upon the resources of the disputed area is a factor that should be given special weight.<sup>65</sup>

1. *The Basis of Title and the "Distance Principle."* In arguing that adjacency measured in terms of distance from the coast has become the decisive factor as regards the basis of title, Canada pointed out that not only does the 200-mile distance criterion constitute the sole basis of title to a fisheries zone or exclusive economic zone, but it has also become accepted as a sufficient basis of jurisdiction over the continental shelf or seabed within that distance. As a result, according to Canada, the "distance principle" implies that distance from the coast is necessarily an important factor in assessing which state has the stronger claim in areas of overlapping seaward extensions.<sup>66</sup>

Canada claimed that each coastal state should therefore receive as much as possible of its 200-mile entitlement without encroachment on the corresponding entitlement of the other party, and that the method most precisely reflecting this requirement is equidistance. Where a maritime zone is defined by distance, in Canada's view, the seaward extension of the zone must be thought of in terms of a "radial" extension from the coast, with equal treatment for all states and their various coasts.<sup>67</sup>

2. *Basic Purposes.* Canada next argued that the basic purposes of the rights and jurisdiction in issue—the objectives the law seeks to achieve—must also have a decisive bearing on determination of a single maritime boundary. Canada contended that, as the name "exclusive economic zones" implies, their central purpose is an economic one, rooted in the

<sup>64</sup> Convention on the Law of the Sea, done Dec. 10, 1982, reprinted in UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. No. E.83.V.5). Article 74, on delimitation of the exclusive economic zone, and Article 83, on delimitation of the continental shelf, provide identically in paragraph 1 that delimitation "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." See Can. Mem. at 122-23.

<sup>65</sup> See Can. Mem. at 123-27, 131-34; Can. C.-Mem. at 229-30; Can. Rep. at 24-25, 119-22; C 1/CR 84/3, at 33-72 (Apr. 4); C 1/CR 84/20, at 41-79 (May 4).

<sup>66</sup> See Can. Mem. at 126-27; Can. C.-Mem. at 230-33; Can. Rep. at 25-27; C 1/CR 84/1, at 61-70 (Apr. 2); C 1/CR 84/18, at 19-20 (May 3).

<sup>67</sup> See Can. C.-Mem. at 62-63, 201, 233-42; Can. Rep. at 29; C 1/CR 84/6, at 64-71 (Apr. 6); C 1/CR 84/18, at 54 (May 3); C 1/CR 84/19, at 58-63 (May 4).

P 3514

special dependence of coastal states upon the resources off their coasts. It was said to follow that the economic dependence of a coastal state on the sea area adjacent to it should be given particular weight for delimitation purposes—especially where the area lies closer to its coast than to the coast of any other state.<sup>68</sup>

In terms of this “human dimension,” Canada argued that the coastal populations of southwest Nova Scotia have a vital dependence on the fishery resources of Georges Bank. Canada also maintained that its Georges Bank fishery has deep historical roots.<sup>69</sup>

3. *Legally Relevant Circumstances.* Under the heading “relevant circumstances,” Canada claimed that the relevant geographical circumstances were those of the Gulf of Maine area itself, rather than any macro-geographical general direction of the North Atlantic coast.<sup>70</sup> As to ecology, Canada’s view was that Georges Bank represents a semi-discrete ecosystem with particular affinities to the northeast, and that the idea of a “natural boundary” at the Northeast Channel is a “myth.”<sup>71</sup> Canada also found various relevant circumstances in the socioeconomic or “human geography” of the area, including the fact that fishing on Georges Bank is conducted primarily by communities located on the “coastal wings” of Nova Scotia between Digby and Lunenburg and of Massachusetts and Rhode Island from Gloucester to Newport.<sup>72</sup>

One area of relevant circumstances emphasized by Canada deserves special mention: the relevant circumstances associated with the conduct of the parties. In regard to fisheries, Canada contended that the Agreement on East Coast Fishery Resources, signed together with the Boundary Agreement but not ratified by the United States, was relevant—not as a binding legal agreement, but for the indicia it provided on the nature of an equitable result in the Gulf of Maine area.<sup>73</sup>

As to the continental shelf, beginning in 1964, Canada issued permits conveying or purporting to convey not only exploratory rights, but also the promise of long-term exploitation rights to oil and gas resources on the northeast portion of Georges Bank. These Canadian permits, which went up to and straddled a strict equidistance line on Georges Bank, were the subject of correspondence between various departments in the United States and Canada concerning the precise location of a median line boundary in accordance with Article 6 of the Convention on the Continental

<sup>68</sup> See Can. Mem. at 59–82; Can. C.-Mem. at 118–24, 242–46; Can. Rep. at 119–34; C 1/CR 84/1, at 43–44, 61–70 (Apr. 2); C 1/CR 84/18, at 18–24 (May 3).

<sup>69</sup> See Can. Mem. at 83–91; Can. C.-Mem. at 126–41; Can. Rep. at 134–38.

<sup>70</sup> See Can. Rep. at 41–64. See also Can. Mem. at 21–36; Can. C.-Mem. at 29–67; C 1/CR 84/2, at 36–46 (Apr. 3).

<sup>71</sup> See Can. Rep. at 65–84. See also Can. Mem. at 37–58; Can. C.-Mem. at 68–99; C 1/CR 84/4, at 5–48 (Apr. 4).

<sup>72</sup> See Can. Rep. at 55–64 and figs. 10 and 11. See also Can. Mem. at 27–36 and fig. 10, showing the “coastal wings”; Can. C.-Mem. at 100–25; C 1/CR 84/2, at 40 (Apr. 3); C 1/CR 84/3, at 23–24 (Apr. 4).

<sup>73</sup> See Can. Mem. at 109–15, 135–36; Can. C.-Mem. at 155–60; Can. Rep. at 105–07; C 1/CR 84/2, at 15–16 (Apr. 3); C 1/CR 84/5, at 19–20 (Apr. 5).

Shelf.<sup>74</sup> Meanwhile, the United States, for its part, has never sold any offshore leases north of a strict equidistance line on Georges Bank.<sup>75</sup> Therefore, existing long-term private rights to the resources of the Georges Bank continental shelf are divided by a strict equidistance line.

The United States claimed in its Memorial, however, to have authorized thousands of miles of geophysical survey work on the northeast portion of Georges Bank "[b]eginning in 1964."<sup>76</sup> This claim was put forward notwithstanding the fact that the United States had assured Canada with respect to the "northern portion of Georges Bank," in a formal aide-mémoire dated November 5, 1969, that "the United States has refrained from authorizing mineral exploration or exploitation in the area."<sup>77</sup> After scrutinizing the U.S. geophysical survey permit materials, Canada explained to the Chamber that both apparently contradictory U.S. statements appeared to be correct—or substantially so. It seemed that, while the United States Government had its own assumed boundary of a strict equidistance line referred to as the "BLM line,"<sup>78</sup> the United States did issue geophysical survey permits for proposed exploratory work northeast of that line up to the maximum equidistance line that could be claimed by the United States (referred to by Canada as the "United States surveys boundary" or "companies' equidistance line").<sup>79</sup> As a result, according to Canada, the United States did early on begin authorizing considerable line mileages of survey work impinging somewhat on the northeast portion of the Bank, insofar as they extended northeast of the Canadian claim line and/or of a strict equidistance line; but the United States did not authorize any substantial exploration northeast of its maximum possible equidistance claim until at least 1972. The large line mileages were accumulated by simply crisscrossing the area between equidistance lines.

4. *Incidental Special Features.* Finally, with regard to the law of maritime delimitation, Canada pointed out that Cape Cod and Nantucket are

<sup>74</sup> See Can. Mem. at 92–99 and fig. 31, 159–72 and fig. 35; Can. C.-Mem. at 143–48 and figs. 31–32; Can. Rep. at 88–98; C 1/CR 84/4, at 49–74 (Apr. 4); C 1/CR 84/5, at 30–52 (Apr. 5); C 1/CR 84/21, at 5–19, 35–45 (May 5). See also U.S. Mem. at 82–83; U.S. C.-Mem. at 95–101; U.S. Rep. at 31–32.

<sup>75</sup> See U.S. Mem. at 60. See also sources cited *supra* note 74.

<sup>76</sup> U.S. Mem. at 58. These claims were later reiterated and expanded. Letter from the Agent of the United States to the Registrar of the Court, Jan. 27, 1984.

<sup>77</sup> Aide-mémoire from the United States to Canada, Nov. 5, 1984, Can. Mem., 3 Annexes, Ann. 13. See also sources cited *supra* note 74.

<sup>78</sup> The "BLM line" was so called after the U.S. Bureau of Land Management. The BLM, within the Department of the Interior, was responsible for U.S. continental shelf policy at the time. On the BLM line, see Can. Rep. at 85–86 *et seq.*; C 1/CR 84/5, at 35–36 *et seq.* (Apr. 5); C 1/CR 84/24, at 39–41 (May 5). Compare C 1/CR 84/14, at 26–31 (Apr. 16); C 1/CR 84/23, at 59–62 (May 9).

<sup>79</sup> The second equidistance line was a "mainland-to-mainland" equidistance line, using a base point on Cape Cod (and, therefore, not really "mainland") but disregarding both Seal Island and Cape Sable Island in Nova Scotia. Canada contended that this line was used by more than 55 U.S. oil companies as the northeast boundary of their proposed surveys in applying to the United States Geological Survey for permits, and that the permits were issued as requested. See C 1/CR 84/5, at 33–36 (Apr. 5).

"incidental, special features," superadded to the general convexity of the Massachusetts coast. Because of their strategic location, under a strict application of the equidistance method (giving full effect to islands), they would attract a sea area more than eight times their land territory. Canada maintained that such a result has been recognized in the law to be inherently inequitable. Consequently, a base point at the Cape Cod Canal was instead used in constructing the Canadian line.<sup>80</sup>

5. *Acquiescence and Estoppel.* In addition to all of the above arguments rooted in the law of the sea, Canada advanced additional arguments in support of an equidistance boundary on the basis of the traditional international law doctrines of acquiescence and estoppel. Beginning in 1964, as has been said, Canada issued some permits conferring the promise of exclusive production rights up to and straddling an equidistance line on Georges Bank.<sup>81</sup> Canada claimed U.S. knowledge of the Canadian permits and acquiescence therein from 1964 or 1965 through the end of 1969. The United States, it was further argued, was now estopped from challenging Canada's equidistance claim.<sup>82</sup>

Canada's argument was essentially one of tacit acquiescence. Canada also relied in part, however, on correspondence between U.S. and Canadian officials dealing with continental shelf affairs, and between the U.S. Embassy in Ottawa and the Canadian Department of External Affairs. In this correspondence, U.S. officials raised questions only about "the median line as defined in Article 6 of the Convention on the Continental Shelf," and the "location of" and "elements positioning" a median line.<sup>83</sup>

#### *Points of Agreement*

As Judge Gros has pointed out, the parties submitted some 7,600 pages of written pleadings, two thousand pages of oral argument and three hundred supporting maps, sketches or diagrams; "more than 12 metres of shelving," he observed, "is taken up by the volumes deposited in the library by the Parties."<sup>84</sup> With that prodigious output, it was virtually inevitable that the parties would manifest some agreement, and that they would even acknowledge that they were in accord on a number of significant points. There remained, however, a substantial number of disputed issues of fact and law to be resolved by the Chamber.

Both parties identified extensive "points of agreement" in their Counter-

<sup>80</sup> See Can. Mem. at 12, 105-06, 143-46 and fig. 33; Can. C.-Mem. at 48, 55-56, 287-89, 290, 296; Can. Rep. at 52-54, 58-59, 163; C 1/CR 84/2, at 69-70 (Apr. 3).

<sup>81</sup> See note 74 *supra* and accompanying text.

<sup>82</sup> See Can. Mem. at 159-80; Can. C.-Mem. at 152-55; Can. Rep. at 84-98; C 1/CR 84/4, at 49-74 (Apr. 4); C 1/CR 84/21, at 5-19 (May 5).

<sup>83</sup> Letters from the U.S. Bureau of Land Management to the Canadian Department of Northern Affairs and National Resources, Apr. 1, 1965 and May 14, 1965 and letter from the U.S. Embassy in Ottawa to the Canadian Department of Mines and Technical Surveys, Aug. 16, 1966, Can. Mem., 3 Annexes, Anns. 1, 4 and 7; U.S. Mem., 4 Annexes, Anns. 53 and 54. See note 74 *supra* and accompanying text.

<sup>84</sup> GOM, Dissenting Opinion of Judge Gros [hereinafter cited as Gros Dissent], para. 2.



Memorials.<sup>85</sup> As regards the law, however, they actually seemed only to be in accord on the relevance of a few legal maxims. These included, as noted above, the basic formula that the Chamber was to decide "in accordance with equitable principles, taking account of all the relevant circumstances, in order to achieve an equitable result."<sup>86</sup> In addition, they both repeatedly cited the maxim from the *North Sea* cases that "the land dominates the sea."<sup>87</sup> The United States and Canada differed greatly, however, over how such notions applied to the Gulf of Maine area.

As to the facts, the parties did manifest agreement in several important areas. This does not mean, of course, that their views coincided on the relevance of those facts.

1. *Geography.* The two parties agreed at the outset that the Gulf of Maine area has two parts, which the United States characterized as its "interior" and "exterior" components and Canada referred to as its "inner" and "outer" portions.<sup>88</sup> They even agreed that the closing line between the two sectors should be drawn from Nantucket Island to Cape Sable, which accord both steadfastly maintained and reaffirmed during the oral proceedings in response to a question from Judge Mosler.<sup>89</sup> The United States also showed a tendency to agree with Canada that the Bay of Fundy is part of the "Gulf of Maine area," but nevertheless denied its relevance for calculating proportionality or certain other purposes.<sup>90</sup>

2. *Continental Shelf.* There was also early agreement that the continental shelf of the Gulf of Maine area is a part of a single, uninterrupted North American Atlantic continental margin, and that its geological structure is "essentially continuous."<sup>91</sup> The pleadings of both sides were consistent as well in their descriptions of the dimensions of the Northeast Channel and the Great South Channel framing Georges Bank, and it was beyond dispute that there are deeper and wider depressions within the Gulf of Maine basin than within the Northeast Channel.<sup>92</sup> Thus, while the significance of the various features of the continental shelf remained controversial, at least their physiography appears to have been essentially uncontested.

3. *Fisheries.* Although the parties engaged in numerous sharp exchanges over statistics concerning the living resources of Georges Bank and those who exploit them—and the relevance of such statistics—they may be said to have agreed on general trends. U.S. fishermen fished the Bank more or "dominated" it in the 19th century, but Canadian fishermen were present in large numbers at least by the 1950s, and by the 1960s Canadian

<sup>85</sup> U.S. C-Mem. at 13-16, 27-28, 37-39, 47-48, 77-78; Can. C-Mem. at 25-28.

<sup>86</sup> See note 26 *supra* and accompanying text.

<sup>87</sup> See note 39 *supra* and accompanying text. See also Can. Mem. at 122, 129-30, 151-52; Can. C-Mem. at 33, 231; Can. Rep. at 6, 33-34, 55-64, 139; C 1/CR 84/1, at 63 (Apr. 2).

<sup>88</sup> U.S. Mem. at 19; Can. Mem. at 137.

<sup>89</sup> See *supra* note 24.

<sup>90</sup> Compare U.S. Mem. at 19; with *id.* at 192-201; U.S. C-Mem. at 196-97 and figs. 24 and 25; U.S. Rep. at 37-40 and figs. 2 and 3. See also Can. Rep. at 45-47 and figs. 4 and 5.

<sup>91</sup> U.S. Mem. at 20, 24; U.S. Rep. at 122. Compare Can. Mem. at 37, 47.

<sup>92</sup> See U.S. Mem. at 20-24; Can. Mem. at 24-25, 47.

catches were significant on the whole of the Bank.<sup>93</sup> Evidence indicated that the disputed portion of Georges Bank supports more jobs and generates more value in Canada than it does in the United States.<sup>94</sup>

4. *Conduct of the Parties.* Here two central sets of facts were fixed. First, as regards conduct in relation to living resources, the Agreement on East Coast Fishery Resources—or, in the words of the United States, the “failed” East Coast fisheries agreement—allocated, or would have allocated, a substantial portion of the Georges Bank living resources (particularly scallops) to Canada. Both parties did sign, but the United States did not ratify, that agreement.<sup>95</sup> And second, both states are parties to the 1958 Convention on the Continental Shelf.<sup>96</sup> In addition, the United States did not object to the Canadian use of equidistance for permits on Georges Bank for at least 4 years according to the United States, or 5 years according to Canada.<sup>97</sup>

#### *Issues before the Chamber*

With such limited areas of agreement, the Chamber was left with quite an array of legal and factual issues still dividing the parties. Indeed, fundamental differences permeated virtually every major area of the case, including applicable law; geography, ecology and oceanography; activities or conduct of the parties; human geography or socioeconomics; and methodology for reaching an equitable result.<sup>98</sup> Most of the major controversies should already be apparent from the discussions above, and they will only be summarized here.

1. *Applicable Law.* The United States and Canada disagreed on the central question of how equitable principles were to be identified and applied. Canada, as discussed above, argued that the applicable law was to be found in the 1958 Convention on the Continental Shelf and in the legal system giving rise to the zones to be delimited, particularly the

<sup>93</sup> See U.S. Mem. at 41–56; U.S. C.-Mem. at 48–63; U.S. Rep. at 137–39. Compare Can. Mem. at 83–89; Can. C.-Mem. at 126–41; Can. Rep. at 105–08, 122–26. See also C 1/CR 84/5, at 9–19 (Apr. 5); C 1/CR 84/13, at 9, 17–23 (Apr. 16); C 1/CR 84/21, at 20–24 (May 5); C 1/CR 84/23, at 43–51 (May 9).

<sup>94</sup> See U.S. C.-Mem., 3 Annexes, Ann. 4, App. B at 2–3, tables 1 and 2. Accord Can. Rep. at 128.

<sup>95</sup> See note 8 *supra* and accompanying text.

<sup>96</sup> See note 21 *supra* and accompanying text.

<sup>97</sup> See U.S. Mem. at 83; U.S. C.-Mem. at 95–101; U.S. Rep. at 32; C 1/CR 84/14, at 16–46 (Apr. 16); C 1/CR 84/23, at 21–25 (May 9). Compare Can. Mem. at 92–93; Can. C.-Mem. at 143–45; Can. Rep. at 86–94; C 1/CR 84/4, at 49–74 (Apr. 4); C 1/CR 84/5, at 33–52 (Apr. 5); C 1/CR 84/21, at 5–19, 35–45 (May 5).

<sup>98</sup> At the beginning of the Canadian Reply (pp. 10–14), an attempt was made at a comprehensive identification of these issues, and the present summary will draw on the Canadian discussion. See Art. 49(2) of the Rules of Court, reprinted in 73 AJIL 748, 764 (1979). Although the United States did not draw up its own comparable express list, its oral presentation recognized and addressed most of the same issues (although there were, of course, a significant number of instances in which the presentations of the two parties were like the proverbial ships passing in the night).

"distance principle." The United States, on the other hand, emphasized more general goals of international law, such as promoting conservation and facilitating dispute settlement.

A particular focus of disagreement was thus whether Article 6 of the Continental Shelf Convention was applicable as a binding treaty rule and/or as a particular expression of a general norm of the new law of the sea. More generally, however, the fundamentally different approaches of the United States and Canada to the applicable law led to very different views as to the criteria for identifying and "balancing up" relevant circumstances in the geography, ecology and oceanography of the Gulf of Maine area, and in the conduct of the parties.<sup>99</sup>

Also, the parties' differences over the nature and operation of equitable principles stemmed from different notions of the nature of appurtenance: whether, as the United States maintained, coastal state title to the continental shelf and 200-mile zone is based on the concept of "perpendicular" extension of "primary" coasts; or whether, as Canada assumed, appurtenance is founded on proximity and adjacency, so that coasts attract sea area on the basis of "radial" projections.<sup>100</sup>

2. *Geography.* The legal issue of the basis of appurtenance was to a large extent interrelated with the question of the proper geographical perspective in the *Gulf of Maine* case. It has been shown that the U.S. emphasis on macro-geography and the general direction of the North American Atlantic coast was met by Canada's insistence on the need to focus on the particular framework of the Gulf of Maine area.<sup>101</sup> This question of geographical scale, in turn, affected the parties' views on the general configuration of the coasts relevant to the delimitation. The United States saw the geographical relationship of the parties as essentially one of "adjacency," determined on the basis of a single general direction; Canada argued that it was predominantly one of "oppositeness," reflecting the changing coastal directions of the concavity of the Gulf of Maine area.<sup>102</sup>

<sup>99</sup> In the *Tunisia/Libya Continental Shelf* case, 1982 ICJ REP. at 58, the Court defined its task as "to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result."

<sup>100</sup> Compare *supra* text at notes 35-40 with text at notes 66-67.

<sup>101</sup> See *supra* text at notes 32, 36-37. Even if the U.S. view of the importance of the general direction of the North Atlantic coast were accepted, the parties could not agree on what that direction is. See *supra* note 36.

<sup>102</sup> More specifically, the United States contended that the United States and Canada are "adjacent States across the entire North American Continent," that "[t]he broad relationship of the coasts of the Parties within the Gulf of Maine is that of adjacent States," and that "the relationship of the United States and Canadian coasts is also adjacent seaward of the Gulf of Maine." U.S. Mem. at 169. See also U.S. C.-Mem. at 18-22; U.S. Rep. at 115-19. Canada responded that the first point, while technically accurate, was either "meaningless or misleading" in the context of maritime delimitation, that the relationship of the parties within the Gulf of Maine is "predominantly one of oppositeness," and that the situation in the outer area is "less clear-cut" and is "a complex one that combines elements of both oppositeness and adjacency, in varying degree." Can. C.-Mem. at 44, 45. See also Can. Mem. at 142-43; Can. Rep. at 48-54.

The parties also disagreed on the relevance of particular geographical features in the area. Canada was of the view, as has been said, that Cape Cod and Nantucket Island are "incidental, special features" whose effect on an equidistance line should be discounted.<sup>103</sup> The United States took the more expansive view that the whole of Nova Scotia is an unnatural "protrusion" that juts "south of the land boundary" and should therefore be ignored (except to adjust the boundary to allow it a narrow band of sea area).<sup>104</sup>

3. *Natural Boundary.* A fourth general area of controversy between the parties, of course, concerned the U.S. claim of three "separate and identifiable oceanographic and ecological regimes" in the Gulf of Maine area, and consequently of a "natural boundary" at the Northeast Channel.<sup>105</sup> Throughout its pleadings, the United States maintained its contention that the Northeast Channel separates stocks of 12 of the 16 commercially important species of fish in the area.<sup>106</sup> Drawing analogies to land boundaries, the United States consequently argued that a Northeast Channel boundary would eliminate friction between the parties by making use of "natural features" and creating a "buffer zone" between their offshore resources, by fixing a line that can be "readily observed by the fishermen" and by eliminating the need for cooperative conservation and management measures.<sup>107</sup>

During the oral proceedings, the United States presented an expert witness, Dr. Robert L. Edwards, one of the most knowledgeable experts in the field,<sup>108</sup> to support these "natural boundary" claims. Counsel for the United States read Dr. Edwards a series of questions and he read a series of answers supporting the U.S. position.<sup>109</sup> On cross-examination,<sup>110</sup> however, Dr. Edwards and counsel for Canada had a lively dialogue concerning 4 of the 12 species in question.<sup>111</sup> Dr. Edwards also acknowledged that he had written in an article in 1978 that, while terrestrial

<sup>103</sup> See *supra* text at note 80.

<sup>104</sup> See U.S. Mem. at 14; see also *id.* at 20, 173-74; U.S. C.-Mem. at 25 n.2; U.S. Rep. at 94. Compare Can. C.-Mem. at 55-56; Can. Rep. at 52-54 and fig. 9. Nova Scotia has a land-mass 38.4 times that of Cape Cod and its off-lying islands. Can. Rep. at 54.

<sup>105</sup> See *supra* text at notes 42, 45-47.

<sup>106</sup> See note 46 *supra* and accompanying text.

<sup>107</sup> U.S. Mem. at 144, 121. See also, e.g., *id.* at 175-76, 201, 206.

<sup>108</sup> Dr. Edwards has had a distinguished career in the field of fisheries management, including as Special Assistant to the Assistant Administrator of Fisheries, U.S. National Oceanic and Atmospheric Administration (NOAA). He is currently director of a research laboratory at the Northeast Fisheries Center, National Marine Fisheries Service, NOAA, U.S. Department of Commerce. He and two colleagues authored the Environmental Annex to the U.S. Counter-Memorial (Ann. 1).

<sup>109</sup> C 1/CR 84/15, at 8-71 (Apr. 18).

<sup>110</sup> Cross-examination of the U.S. expert, C 1/CR 84/16, at 5-32 (Apr. 18), was conducted by Yves Fortier, Q.C., past President of the Canadian Bar Association.

<sup>111</sup> In the course of his examination in chief, Dr. Edwards had discussed haddock, cod, herring, yellowtail flounder, scallops and lobster. Cross-examination dealt with longfin squid, cusk, white hake and redfish. See *supra* note 46.

ecosystems are relatively stable in their geographic boundaries, "[i]n the ocean, boundaries and distribution of ecosystems change constantly."<sup>112</sup>

In calling the U.S. "natural boundary" argument mythical, the Canadian Reply claimed that the United States had failed to cite "any scientific work on the Gulf of Maine area—published before the institution of these proceedings" that either described "three separate and identifiable regimes" in the area or described the Northeast Channel as a "natural boundary."<sup>113</sup> At the oral proceedings, since this was a U.S. argument, Canada did not find it necessary to present a Canadian witness.

4. *Conduct of the Parties.* Again to begin with the continental shelf, it was an objective fact that, for whatever reasons on the part of the two states, outstanding United States leases and Canadian permits<sup>114</sup> conferring rights on private parties are divided by an equidistance line on Georges Bank.<sup>115</sup> The parties disagreed, however, on the significance of the reaction—or lack of one—of the United States to the issuance of the Canadian Georges Bank permits from 1964 on. Moreover, Canada contended that the United States had in fact respected an equidistance boundary (although considerably to the northeast of Canada's own claimed equidistance line) on Georges Bank when it issued geophysical survey permits for the area.<sup>116</sup>

Discussion of the major areas of disagreement on fisheries need not be repeated. In addition to the relevance of the unratified—or, as the United States preferred, "failed"—Agreement on East Coast Fishery Resources,<sup>117</sup> the United States disagreed with Canada over the reality, relevance and degree of dependence of coastal communities in southwest Nova Scotia on Georges Bank.<sup>118</sup>

5. *Equitable Result.* On the central question of an "equitable result," obviously the positions of the parties diverged widely—by up to 30,000

<sup>112</sup> C 1/CR 84/16, at 31 (Apr. 18). The quotation is from an article written by Dr. Edwards in 1978, entitled *North Atlantic Fisheries: Recent Changes in Population and Outlook*. The United States said that it did not find Dr. Edwards's statement, in its full context, inconsistent with his testimony. See C 1/CR 84/26, at 31 (May 11).

<sup>113</sup> Can. Rep. at 81–82.

<sup>114</sup> Unfortunately, the parties use slightly different and confusing terminology. Basically, it seems that Canadian "permits," like U.S. "leases," confer long-term, exclusive continental shelf rights. U.S. geophysical survey "permits," like Canadian exploratory "licenses," grant nonexclusive authorization to do exploratory work in offshore areas; they both expire annually. For discussion, see Can. Rep. at 99; C 1/CR 84/5, at 31–32 (Apr. 5).

<sup>115</sup> On the Canadian permits, see *supra* text at notes 74–75. The United States issued a "call for nominations" for tracts on Georges Bank in 1975, but did not actually hold a lease sale until 1979. Since the northeast portion of Georges Bank was already in dispute by 1976, quite properly, the United States withdrew the tracts in the disputed area from the proposed sale that year. For discussion, see U.S. Mem. at 84–86; Can. Mem. at 99.

<sup>116</sup> See *supra* text at notes 76–79.

<sup>117</sup> See *supra* note 8 and accompanying text; text at note 95.

<sup>118</sup> For the Canadian view, see *supra* text at note 53. For the U.S. rejection of this argument, see U.S. C-Mem. at 214–17; C 1/CR 84/14, at 46–73 (Apr. 16); C 1/CR 84/23, at 65–74 (May 9).



square nautical miles or so.<sup>119</sup> Not only did they disagree on the relevant circumstances and methodology—the U.S. theory of “primary coasts” and “perpendicular” seaward extensions versus Canada’s reliance on equidistance and “radial” extensions—but also they disagreed on how to test the equity of the result. The proportionality tests comparing ratios of coast to sea areas put forward by Canada and the United States were vastly different, primarily because they focused on very different test areas.

In its Memorial, the United States set forth a proportionality test using one “perpendicular” to the alleged general direction of the coast of 200 miles at Nantucket Island, and another approximately 280 miles long at a point beyond Halifax (the length reflecting the fact that a 200-mile arc drawn from Sable Island intersects this line 280 miles from the mainland Nova Scotia coast).<sup>120</sup> Thus, the U.S. proportionality test centered on the border between Maine and New Brunswick, and omitted the United States coast and sea area southwest of the Gulf of Maine, while including the Canadian coast and sea area northeast of the Gulf of Maine up to just beyond Halifax. The coasts and sea area of the Bay of Fundy were excluded altogether (except that the United States claimed to have arrived at the northeast limit of its area at a point beyond Halifax by drawing a perpendicular at the Chignecto Isthmus at the far end of the Bay of Fundy).<sup>121</sup>

In its Counter-Memorial, the United States modified this test in two ways: first, by using the 1,000-fathom depth contour instead of a previous “straight” line as the outer limit of the test area; and second, by marking the inner limit by “straight baselines,” from Nantucket to Cape Ann, from Cape Ann to the international boundary terminus, from that point across the Bay of Fundy all the way to Cape Sable, and from there to the point beyond Halifax.<sup>122</sup>

<sup>119</sup> The figure of up to 30,000 square nautical miles represents the difference between the U.S. claim as revised at the Memorial stage and the Canadian claim in the area within the 200-mile arcs used for the fisheries or economic zones of the parties. As regards subsequent delimitation, not involved in this case, of the continental shelves of the parties beyond 200 miles, there may be up to another 20,000 or so square nautical miles at issue. These mileage figures are obviously approximate, and they also vary depending on what is used as the outer limit of the disputed area.

<sup>120</sup> U.S. Mem. at 192–201 and figs. 34 and 35. The lines were drawn on a Mercator projection. The end points of these “perpendicular” lines were connected by a “straight” line, and the fourth or inner boundary of this test area consisted of a line from Nantucket across to Cape Cod, then a trace following the sinuosities of the New England coast to the vicinity of the Canadian border, followed by a closing line across the mouth of the Bay of Fundy, and then a trace of the Canadian coast from Yarmouth around to the point beyond Halifax.

<sup>121</sup> Figure 34 of the U.S. Memorial applied this proportionality test to the U.S. “adjusted perpendicular” line; it found a ratio, if the area were to be delimited by this line, of United States:Canada, 63:37. Figure 35 applied the same test to “the equidistant line,” resulting in a ratio of United States:Canada, 36:64.

<sup>122</sup> Figure 24 of the U.S. Counter-Memorial applied this modified test to the U.S. “adjusted perpendicular line,” resulting in a ratio of United States:Canada, 62:38. Figure 25 applied the same test to “the Canadian line,” resulting in a ratio of United States:Canada, 42:58.

Canada, for its part, expressed reservations about applying any proportionality test to an open sea area like the outer portion of the Gulf of Maine area; nevertheless, it proposed two alternative tests.<sup>123</sup> Canadian Proportionality Test A used for lateral limits "perpendiculars" at points equally distant from the entrance points of the Gulf of Maine, in the vicinity of Newport, Rhode Island and of Lunenburg, Nova Scotia; it took the 200-mile arcs delimiting the zones of the parties as its outer limits.<sup>124</sup> And Proportionality Test B made use of the sides of the triangle from the Special Agreement extended shoreward.<sup>125</sup>

Canada also found tests of equity in the conduct of the parties. The U.S. and Canadian lines were compared to the location of outstanding U.S. and Canadian oil and gas leases and permits.<sup>126</sup> They were also viewed in comparison to a computer-generated line reflecting the resource entitlements established under the 1979 East Coast Fishery Resources Agreement.<sup>127</sup>

### III. THE JUDGMENT

The Chamber drew a line: a single maritime boundary. Virtually all of the positive legal arguments of both parties were rejected, but unfortunately the Chamber appears to have been somewhat more forthcoming about its reasons for disagreement than about the legal bases for its own thinking, other than to stress geographical considerations as of central importance.

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In the U.S. Reply, the proportionality test developed in the Counter-Memorial was used again. Figure 2 applied it to "the line proposed by the United States in 1976," resulting in a ratio of United States:Canada, 54:46. Figure 3 applied the test to "the 1976 Canadian line," resulting in a ratio of United States:Canada, 45:55.

<sup>123</sup> Can. C.-Mem. at 294-300. See also Can. Mem. at 152-55; Can. Rep. at 159-63.

<sup>124</sup> Canadian Proportionality Test A in figure 51 of the Canadian Counter-Memorial resulted in area ratios for the Canadian and U.S. lines respectively of Canada:United States, 42:58 and 19:81.

<sup>125</sup> The inner side of the area was in both cases composed of straight baselines from Nantucket to Cape Ann, on to Cape Elizabeth, from there to Cape Maringouin in the vicinity of the Chignecto Isthmus, across to Cape Split, southwest to a point near Digby, on to Cape St. Marys, Cape Sable and Lunenburg. Proportionality Test B in figure 52 of the Canadian Counter-Memorial resulted in area ratios for the Canadian and U.S. lines of Canada:United States, 39:61 and 18:82.

<sup>126</sup> Can. C.-Mem. at 300-02 and fig. 53. Figure 53 showed the offshore oil and gas exploratory permits in the Gulf of Maine area as depicted in the U.S. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, EASTERN UNITED STATES COASTAL AND OCEAN ZONES DATA ATLAS (1980). Outstanding U.S. leases and Canadian permits are divided by an equidistance line on Georges Bank. See *supra* text at notes 74-75, 81-83, 97, 114-15.

<sup>127</sup> Can. C.-Mem. at 300-02 and fig. 54. Canada did a computer analysis of catch "entitlements" or allocations to each party under the 1979 East Coast Fishery Resources Agreement for 13 species. Lines were then computed dividing the biomass of each species in accordance with the allocations in the agreement, the species were weighed in proportion to their potential yield and commercial value, and a composite line was computed dividing the complex of species in question according to the allocations contained in the agreement. The composite line that resulted was very close to the Canadian claim (a few miles to the northeast).

Still, the Chamber was not empowered to reach an *ex aequo et bono* result, and if the decision offers less guidance than some might have wished for future delimitations, by the very fact of rejecting various arguments the Chamber at least clarified the law.

Rather than attempt to answer directly the question of the nature and effects of the Chamber's Judgment, an attempt will be made here to analyze just what was said in the opinions. In the four to one decision, Judges Ago and Mosler and both national judges (Judge Schwebel and Judge *ad hoc* Cohen) constituted the majority. Judge Gros filed a vehement dissent, arguing that the boundary should have adhered more strictly to equidistance methodology. Judge Schwebel also filed a separate opinion; although voting with the majority, he felt that the boundary should have been a few miles further northeast.

### *The Judgment of the Chamber*

1. *Jurisdiction and Duties.* After the usual preliminaries (describing the stages of the proceedings and setting out the formal submissions of the parties), in part I of the Judgment the Chamber reviewed the terms of the Special Agreement. Since the Special Agreement eliminated any preliminary questions concerning jurisdiction, the Chamber noted that the only initial problem was to what extent it was bound by the starting point selected by the parties, i.e., Point A. (See map 2, p. 547 *supra*.) Since Canada and the United States had by mutual agreement taken a step toward resolution of their dispute, the Chamber concluded that it should conform to the terms defined by the parties.<sup>128</sup>

The Chamber then proceeded to discuss what it saw as the two profound differences between *Gulf of Maine* and the previous delimitation cases before the International Court of Justice (i.e., *North Sea Continental Shelf* and *Tunisia / Libya*<sup>129</sup>). The first was that the Chamber was asked not only for principles and method, but to draw an actual line, as had been the arbitral tribunal in the *Anglo-French* case.<sup>130</sup>

The second novel aspect noted by the Chamber was that the parties had asked for a single boundary, delimiting both their continental shelves and fisheries or exclusive economic zones. Remarking that the parties had simply taken it for granted that it would be possible to draw such a single boundary, the Chamber, for its part, was "of the opinion that there is certainly no rule of international law to the contrary, and, in the present case, there is no material impossibility in drawing a boundary of this kind."<sup>131</sup>

2. *The "Gulf of Maine Area."* In part II of the Judgment, the Chamber described the area within which the delimitation was to be carried out, called by the parties the "Gulf of Maine area." This area was found to be "roughly the shape of an elongated rectangle," whose short sides are made up by the coasts of Massachusetts and Nova Scotia (including part

<sup>128</sup> GOM, paras. 20-23.

<sup>130</sup> GOM, paras. 24-25.

<sup>129</sup> 1982 ICJ REP. 18 and 1969 ICJ REP. 3.

<sup>131</sup> *Id.*, para. 27.



of the Bay of Fundy), and whose long landward side is made up of the coast of Maine from Cape Elizabeth to the international boundary terminus. The seaward side would be the agreed Nantucket to Cape Sable closing line.<sup>132</sup> In speaking of "long" and "short" sides, however, the Chamber made clear that these references, "must not be interpreted as an espousal of the idea that some of the coastal fronts of the Gulf of Maine should be considered as 'primary' fronts and others as 'secondary,'" as per the United States argument.<sup>133</sup>

The Chamber, of course, also noted that the delimitation was not to be limited to the inner Gulf of Maine. It rejected, however, attempts of both parties to involve coasts other than those directly surrounding the Gulf, insofar as they would have the effect of extending the delimitation area to "maritime areas which have in fact nothing to do with it."<sup>134</sup>

Rejecting arguments of geological affinities of Georges Bank to Massachusetts or Nova Scotia, the Chamber observed that the parties were "in fact in agreement that geological factors are not significant in the present case."<sup>135</sup> Similarly, it found as to geomorphology that "[t]he continental shelf of the whole of this area is no more than an undifferentiated part of the continental shelf of the eastern seaboard of North America, from Newfoundland to Florida," the Northeast Channel lacking "the characteristics of a real trough marking the dividing-line between two geomorphologically distinct units."<sup>136</sup>

As regards the water column, the Chamber rejected the U.S. idea of a "natural boundary." The Chamber declared itself "not . . . convinced of the possibility of discerning any genuine, sure and stable 'natural boundaries' in so fluctuating an environment as the waters of the ocean, their flora and fauna."<sup>137</sup>

The Chamber considered whether, in addition to the physical aspects of the area, its socioeconomic conditions should be considered. Noting that the parties had discussed these *in extenso*, the Chamber at this point only observed somewhat vaguely that such fishing, continental shelf and other activities "may require an examination of valid considerations of a political and economic character."<sup>138</sup>

3. *History of the Dispute.* Part III of the Judgment then dealt with the history of the dispute. The Chamber found the dispute to be of "recent origin," having first developed in relation to the continental shelf in the 1960s. The Chamber reviewed the contentions of the parties concerning their offshore permits and the correspondence between American and Canadian officials at the technical and diplomatic level regarding the Georges Bank continental shelf. There follows an account of the events occurring in both countries in connection with their extensions of fisheries jurisdiction out to 200 miles.<sup>139</sup>

<sup>132</sup> *Id.*, paras. 28-35.

<sup>134</sup> *Id.*, para. 41.

<sup>136</sup> *Id.*, paras. 45, 46.

<sup>138</sup> *Id.*, para. 59.

<sup>133</sup> *Id.*, para. 36.

<sup>135</sup> *Id.*, para. 44.

<sup>137</sup> *Id.*, para. 54.

<sup>139</sup> *Id.*, para. 69.

The Chamber also recounted the history of the lines claimed by the two parties, the United States Northeast Channel line of 1976 and the Canadian strict equidistance claim at the same time (see map 2, p. 547 *supra*), and the later expanded Canadian equidistance claim of late 1977 and the United States "adjusted perpendicular" (see map 2, p. 547 *supra*). In the course of this discussion, the Chamber had occasion to note that the Boundary Treaty submitting *Gulf of Maine* to third-party settlement had originally been interdependent with the Agreement on East Coast Fishery Resources, and to note the demise of the second agreement.<sup>140</sup>

The Chamber's overall assessment of the history of the dispute was that, while the United States attributed importance in particular to the fishing aspect, Canada gave priority to the original continental shelf aspect.<sup>141</sup> The Chamber also remarked in passing that "it is certain that the gap between the Parties' respective positions has become noticeably wider between the moment when the dispute appeared in their relations and the moment of its being referred for judgment to the Chamber."<sup>142</sup>

4. *The Parties' Claims and Lines.* In part IV the Chamber dealt with the principles and rules of international law applicable to the delimitation. As indicated earlier, it rejected most of the positive legal arguments advanced by the parties.

After some initial general observations about the nature of customary international law and treaty law, the Chamber began its analysis of the conventional law with the 1958 Convention on the Continental Shelf, to which both Canada and the United States are parties. In particular, Article 6 affirms the principle that delimitation must be effected by agreement between the states concerned.<sup>143</sup> The Chamber also referred to the *North Sea Continental Shelf Cases* for the principle that delimitation should be effected by agreement and "in accordance with equitable principles," and to the *Tunisia/Libya Continental Shelf* case on the latter point.<sup>144</sup> Finally, it found the delimitation provisions of the 1982 Convention on the Law of the Sea to be compatible on these points.<sup>145</sup>

Turning specifically to the respective positions of the parties, the Chamber rejected their arguments in short order. Canada's contentions regarding the "basis of title" to offshore zones were found to represent an unconvincing attempt to turn equidistance into a genuine rule of law.<sup>146</sup> On the other hand, the Chamber repeated the opinion that the alternate contentions of the United States regarding "primary" and "secondary" coasts were "unacceptable both in geography and in law."<sup>147</sup> "Each Party's reasoning," the Chamber said, "is in fact based on a false premise."<sup>148</sup>

<sup>140</sup> *Id.*, paras. 70-78.

<sup>142</sup> *Id.*, para. 78.

<sup>144</sup> *Id.*, paras. 91-93.

<sup>146</sup> *Id.*, paras. 102-107.

<sup>148</sup> *Id.*, para. 109. The Chamber gave some other examples of false "principles" advanced by the parties as rules of law, such as Canada's idea that a single maritime boundary should ensure the preservation of existing fishing patterns, or the idea advocated by the United States that a boundary should make it possible to ensure the optimum conservation and

<sup>141</sup> *Id.*, para. 70.

<sup>143</sup> *Id.*, paras. 84-90.

<sup>145</sup> *Id.*, paras. 94-96.

<sup>147</sup> *Id.*, para. 103.

The Chamber proceeded to summarize the prescriptions of general international law for maritime delimitation between neighboring states as follows:

(1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

(2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.<sup>149</sup>

5. *Equitable Criteria and Practical Methods Applicable to the Delimitation.* The Chamber turned in part V to the application of equitable criteria and the use of practical methods in the delimitation process, again taking as its starting point the 1958 Convention on the Continental Shelf. In this regard, the Chamber was of the view that, if a question had arisen between the United States and Canada on the delimitation of the continental shelf, "there would be no doubt as to the mandatory application of the method prescribed in Article 6."<sup>150</sup> The Chamber did not believe, however, that the provisions of Article 6 could be turned into a general rule applicable to every maritime delimitation and held that there was no obligation to apply them to the delimitation of a single maritime boundary.<sup>151</sup>

The Chamber next considered at length Canada's contentions about U.S. conduct concerning the Canadian continental shelf permits.<sup>152</sup> Dealing first with the argument that the U.S. conduct evidenced consent to the idea of a median line boundary, the Chamber found Canadian reliance on the doctrines of acquiescence and estoppel unwarranted in the circumstances. It also rejected further Canadian arguments that the U.S. conduct indicated the existence of a *modus vivendi* or *de facto* boundary, or afforded indicia of what the parties themselves considered equitable, though it commented that the U.S. conduct "revealed uncertainties and a fair degree of inconsistency."<sup>153</sup> Then, being evenhanded, the Chamber could not "fail to mention" that it also rejected the United States contentions regarding Canada's consent to the 100-fathom depth contour mentioned in connection with the Truman Proclamation.<sup>154</sup>

6. *Criteria and Methods Proposed by the Parties and Resulting Lines.* In part VI, the Chamber turned to the criteria and methods proposed by each of

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management of living resources and at the same time reduce the potential for future disputes between the parties.

<sup>149</sup> *Id.*, para. 112.

<sup>151</sup> *Id.*, paras. 119-125.

<sup>153</sup> *Id.*, para. 138.

<sup>150</sup> *Id.*, para. 118.

<sup>152</sup> *Id.*, paras. 128-152.

<sup>154</sup> *Id.*, para. 153.

the parties and to a comparative analysis of the four lines resulting from them. First, as to the U.S. 1976 line, it was found to accord decisive importance to natural factors (the geomorphology and especially the ecological aspects of the area), in keeping with the particular interest of the United States in the "maritime" or "fisheries" aspect of the dispute. At the oral argument stage, the United States contended that this line conformed with Article 6 of the Continental Shelf Convention, which the Chamber regarded as "a courteous gesture in the direction of an instrument recognized as being still in force between the Parties rather than a manifestation of any intention to implement its substance."<sup>155</sup> Apart from that, the Chamber felt, "[t]he fundamental fact remains that the criterion underlying the United States line of 1976 was too much geared to one aspect of the present problem for it to be capable of being considered equitable in relation to the characteristics of the case."<sup>156</sup>

Though the U.S. 1982 line was based more than the 1976 line on geography or "ecogeography," an essential condition for using the method of a perpendicular to the general direction of the coastline, the Chamber observed, is that the two countries involved in the delimitation lie successively along a more or less rectilinear coast. In sum:

[T]he method of delimitation by the perpendicular to the coast or to the general direction of the coast might possibly be contemplated in cases where the relevant circumstances lent themselves to its adoption, but is not appropriate in cases where these circumstances entail so many adjustments that they completely distort its character.<sup>157</sup>

The two lines adopted successively at the end of 1976 and the end of 1977 by Canada could be considered together, since they were essentially based on the same criterion and both purported to be the result of applying the equidistance method. Having already stated that application of the equidistance method was not mandatory under Article 6, the Chamber observed that this does not imply that Canada was bound to refrain from applying any such method for drawing the boundary claim it intended to propose.

In this case, the Chamber found, the United States has considerably greater coast on the perimeter of the Gulf of Maine than Canada, and the respective length of coasts is a special circumstance of some weight, justifying a correction of the equidistance line or of any other line (although it does not itself constitute either a criterion serving as a direct basis for a delimitation or a method that can be used to implement a delimitation). Moreover, Canada seems not to have appreciated the significance of the change in the respective positions of the coasts of the United States and Canada from a quasi-right-angle lateral adjacency at the international boundary terminus to a frontal opposition between the remaining coasts of Massachusetts and Nova Scotia.<sup>158</sup>

<sup>155</sup> *Id.*, para. 167.

<sup>157</sup> *Id.*, para. 177.

<sup>156</sup> *Id.*, para. 168.

<sup>158</sup> *Id.*, paras. 184-186.

7. *Criteria and Methods Held Applicable.* The Chamber then proceeded to form its own solution to the problem of criteria and methods and to draw the line. In so doing, it again stressed the unprecedented character of the delimitation that was required to be carried out, combining two distinct elements into a single line applicable to both the continental shelf and the water column. Such a delimitation, the Chamber emphasized, "can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other."<sup>159</sup>

As a result, the Chamber felt bound to turn towards "an application to the present case of criteria more especially derived from geography," this being understood to be "mainly the geography of coasts, which has primarily a physical aspect, to which may be added, in the second place, a political aspect."<sup>160</sup> While the aim should be an equal division of the area where the maritime projections of the coasts of the states concerned in the delimitation converge and overlap—a "criterion which need only be stated to be seen as intrinsically equitable"<sup>161</sup>—it must be tailored to the case in question. In the *Gulf of Maine* situation, this means that corrections must be made for the by no means negligible difference within the delimitation area between the lengths of the respective coastlines of the parties. The Chamber also expressed reservations about any method that gives undue effect to tiny islands, uninhabited rocks or low-tide elevations, sometimes lying at a considerable distance from *terra firma*.<sup>162</sup> Just like the criteria to be applied, the methods used to put them into practice must be influenced by the particular characteristics of delimitation of a single, dual-purpose boundary.<sup>163</sup>

The configuration of the coasts of the Gulf of Maine was found to exclude any possibility that the boundary could be formed by a single line. It is only in the northeastern sector of the Gulf that the prevailing relationship is one of lateral adjacency; in the sector closest to the closing line, it is one of oppositeness. In the Chamber's view, it was therefore obvious that between Point A and the Nantucket-to-Cape Sable closing line, the delimitation line must comprise two segments.<sup>164</sup>

For the *first segment* closest to the international boundary terminus, the Chamber found no special circumstances to militate against the division, as far as possible, of the overlapping area into equal parts. Note was taken of the disadvantages that an equidistance line would entail: all the base points would probably be located on a handful of isolated rocks or a few low-tide elevations; it would be difficult to locate base points in view of the continuing uncertainty about sovereignty over Machias Seal Island; and Point A is not located on the path of any equidistance line drawn from base points in undisputed territory. Instead, the Chamber drew from Point A perpendiculars to the two basic coastal lines (from Cape Elizabeth

<sup>159</sup> *Id.*, para. 194.

<sup>161</sup> *Id.*, para. 197; *see also* para. 195.

<sup>163</sup> *Id.*, paras. 202–205.

<sup>160</sup> *Id.*, para. 195.

<sup>162</sup> *Id.*, paras. 195–201.

<sup>164</sup> *Id.*, para. 207.

to the international boundary terminus and from there to Cape Sable) and bisected the angle thus formed. The finishing point of the first segment was to be automatically determined by its intersection with the line containing the next segment. (See map 1, p. 542 *supra*.<sup>165</sup>)

The *second segment* of the boundary, the Chamber observed, "though it may be the shortest, will certainly be the central and most decisive segment for the whole of the delimitation line."<sup>166</sup> Since the Chamber was here dealing with the "quasiparallelism" between the coasts of Nova Scotia and Massachusetts, the application of a geometrical method could only result in the drawing of a median line approximately parallel to them. This might have been appropriate, the Chamber observed, if the boundary ended in the very middle of the coast at the back of the Gulf, but not given its actual location.<sup>167</sup>

Therefore, the Chamber undertook a corrective exercise. It found the total length of U.S. coastline on the Gulf to be approximately 284 nautical miles and that of the Canadian coasts (including part of the Bay of Fundy<sup>168</sup>) to be 206 miles, making a ratio of coastlines of 1.38 to 1.<sup>169</sup> The Chamber then considered that a further correction was necessary for Seal Island, since it would be excessive to consider the Canadian coast as displaced southwesterly by as much as the distance between Seal Island and mainland Nova Scotia, and so it was deemed appropriate to give half effect to that island. Taking that into account, the ratio to be applied to determine the position of the corrected median line across the Gulf between the points where the coasts of Nova Scotia and Massachusetts are closest<sup>170</sup> was 1.32 to 1. The second segment of the boundary thus began where this corrected median line intersected the bisector drawn from Point A and ended where it intersected the oft referred to Nantucket-to-Cape Sable closing line. (See map 1, p. 542 *supra*.<sup>171</sup>)

Finally, the *third segment* of the boundary is the one that actually crosses Georges Bank. Since this segment would inevitably be situated throughout its entire length in open ocean, it seemed to the Chamber "obvious that the only kind of practical method which can be considered for [delimiting the final segment] is, once again, a geometrical method," and that "the most appropriate is that recommended above all by its simplicity, namely in this instance the drawing of a perpendicular to the closing line of the Gulf."<sup>172</sup>

<sup>165</sup> See also *id.*, paras. 209-214.

<sup>166</sup> *Id.*, para. 214.

<sup>167</sup> *Id.*, para. 217.

<sup>168</sup> The Chamber included the coast of the Bay of Fundy to that point where there ceased to be any waters more than 12 miles from a low-water line. In using coasts on both sides of the Bay of Fundy, the Chamber rejected a U.S. argument that parallel coasts should not be double-counted. See *id.*, para. 221.

<sup>169</sup> A technical report of the expert, Commander Beazley, *supra* note 15, is annexed to the Judgment of the Chamber. It demonstrates how these and other calculations were made and points located.

<sup>170</sup> Such a line reaches from the tip of Cape Cod to Chebogue Point. See GOM, para. 223.

<sup>171</sup> See also *id.*, paras. 214-223.

<sup>172</sup> *Id.*, para. 224.

The Chamber pointed out that this third segment was on practically the same azimuth as that given by both parties to the final portion of their claim lines. As to the critical question of the point on the closing line from which to begin, it should coincide with the point of intersection of the corrected median line of the second segment. The terminus of this final segment was situated within the triangle specified in the Special Agreement and coincided with the last point reached within the overlapping of the 200-mile zones of the parties. (See map 1, p. 542 *supra*.<sup>173</sup>)

8. *Tests of Equity*. In the final section of the Judgment, the Chamber recalled that "[t]he fundamental rule of general international law governing maritime delimitations, the rule which provided the Chamber with its starting-point for the reasoning so far followed, requires that the delimitation line be established while applying equitable criteria to that operation, with a view to reaching an equitable result."<sup>174</sup> Therefore, the last remaining task of the Chamber before formulating its final decision was to ascertain whether the result could be considered intrinsically equitable, in the light of all the circumstances which may be taken into account for the purposes of that decision.

Such verification was not absolutely necessary for the first two segments of the line within the Gulf since their guiding parameters were provided by geography.<sup>175</sup> The third segment, however, was another matter because it traverses Georges Bank, the principal stake in the dispute.

In the eyes of the United States, the main consideration in this last regard was the historical presence of man in the disputed area, and the United States emphasized especially its long tradition of fishing and other activities. Canada laid greater emphasis on what it considered the socio-economic aspects, in particular the maintenance of existing fishing patterns vital to coastal communities.<sup>176</sup>

The Chamber said that it could not adopt these positions of the parties.<sup>177</sup> Until very recently, the fisheries in question were high seas and as such freely open to fishing by nationals of all countries. Consequently, in the Chamber's view, it was "evident that the respective scale of activities connected with fishing—or navigation, defence or, for that matter, petroleum exploration and exploitation—cannot be taken into account as a relevant circumstance or . . . an equitable criterion . . . in determining the delimitation line."<sup>178</sup> What the Chamber would regard as a legitimate scruple, on the other hand, was whether the result was "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned."<sup>179</sup>

Fortunately, there was no need to fear any such danger with the present line, or more particularly its third segment, since it

<sup>173</sup> See also *id.*, paras. 224–229.

<sup>175</sup> *Id.*, paras. 230–231.

<sup>177</sup> *Id.*, para. 235.

<sup>179</sup> *Id.*

<sup>174</sup> *Id.*, para. 230.

<sup>176</sup> *Id.*, paras. 233–234.

<sup>178</sup> *Id.*, para. 237.

crosses the waters covering Georges Bank at such a distance from that feature's extremity in the direction of the Northeast Channel as to leave on the Canadian side the greater part of the "Northern Edge and Peak" of the Bank, where the greatest concentrations of the sedentary species—in particular scallop—exploited by Canadian fishermen are to be found.<sup>180</sup>

And with a final thought as to future relations, the Chamber added:

Canada and the United States have to their credit too long a tradition of friendly and fruitful co-operation in maritime matters, as in so many other domains, for there to be any need to fear an interruption of that co-operation, which clearly now becomes all the more necessary, not only in the field of fisheries but also in that of hydrocarbon resources.<sup>181</sup>

*Separate Opinion of Judge Schwebel*

Judge Schwebel voted for the Chamber's Judgment because he agreed with the essentials of its analysis and reasoning, and because he found that the resulting line of delimitation was "not inequitable." In his opinion, the Chamber was right to exclude the claims of both the United States and Canada, not with a view toward "splitting the difference," but because those claims were insufficiently grounded in law and equity. He was unable to accept the U.S. contention that Georges Bank was "as American as apple pie," and he thought it should be divided.

What Judge Schwebel disagreed with was the placement of the dividing line. He felt that the adjustment applied by the Chamber was inadequate because of its treatment of the Bay of Fundy. In his opinion, only that portion of the coast of New Brunswick which "actually fronts upon the Gulf of Maine" should be included in the calculations.<sup>182</sup>

The approach that Judge Schwebel would have had the Chamber adopt was illustrated on a map annexed to his separate opinion (see map 1, p. 542 *supra*). He nevertheless voted for the Judgment not only because he was generally in agreement with its reasoning, but also because he recognized that the factors which gave rise to the difference between the Chamber's line and his were open to more than one legally—and equitably—plausible interpretation.

*Dissenting Opinion of Judge Gros*

Judge Gros, as indicated earlier, dissented from the Judgment of the Chamber. In his view, continental shelf law has changed from what it had been under the 1958 Convention on the Continental Shelf and in the *North Sea* cases and the *Anglo-French* arbitration. Even before the conclusion

<sup>180</sup> *Id.*, para. 238.

<sup>181</sup> *Id.*, para. 240.

<sup>182</sup> According to Judge Schwebel, this would include the coast of New Brunswick from the international border as far as Point Lepreau and, at most, St. John, together with the length of a closing line running from one of those points to Brier Island, Nova Scotia.



of the 1982 Law of the Sea Convention, the *Tunisia / Libya* case constituted a sudden change in the case law.<sup>183</sup>

Prior to the 1982 Convention, international law had developed a few firm precepts: equidistance plus the special circumstances of the area to be delimited, with the configuration of the coasts and their special aspects and nature in the forefront. In redefining the law of maritime delimitation on the basis of Articles 74 and 83 of the 1982 Convention, in Judge Gros's opinion, the Chamber "has exposed the disservice rendered international law by the Third United Nations Conference [on the Law of the Sea] . . . summed up in two words: agreement + equity."<sup>184</sup> What is today called equitable "is no longer a decision based on law but an appraisal of the expediency of a result, which is the very definition of the arbitrary, if no element of control is conceivable."<sup>185</sup> This, Judge Gros feels, "renders the judge's mission impossible, except as a conciliator, which is a role he has not been asked to fill."<sup>186</sup>

Judge Gros developed these thoughts at some length. The bottom line, however, was that he emphasized the role of equidistance in the law and believed that the boundary should be an equidistance line constructed from mainland base points,<sup>187</sup> which is illustrated on a map annexed to his opinion (see map 1, p. 542 *supra*). In contrast, he claimed, the

course taken since February 1982 [the *Tunisia / Libya* Judgment] has been to indulge in an equity beyond the law, detached from any established rules, based solely on whatever each group of judges seised of a case declares itself able and free to appreciate in accordance with its political or economic views of the moment.<sup>188</sup>

#### IV. CONCLUSION

The *Gulf of Maine* case is over, the decision has come down and the boundary in the Gulf of Maine area is fixed (out to a point within the overlapping 200-mile zones of both parties). Canada and the United States already shared approximately 5,525 statute miles of land and water boundary—the longest open border in the world—and now they have added 250 or so nautical miles of maritime boundary. The two nations also have long enjoyed numerous shared resources that raise consequent transboundary management challenges, and it is now clear that Georges Bank with its great wealth of living resources is one of them.

It is beyond dispute, however, that the proceedings in the *Gulf of Maine* case and the Judgment itself leave a large number of unanswered questions

<sup>183</sup> GOM, Gros Dissent, para. 3 *et seq.*

<sup>184</sup> *Id.*, para. 27.

<sup>185</sup> *Id.*, para. 38.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*, para. 45. For the construction of the Gros equidistance line, Canada's Cape Brier, Tuscet and Cape Sable Islands and the U.S. Great Wass, Mount Desert and Vinalhaven Islands were all treated as part of the mainland. No account was taken of Nantucket or the other islands and islets south of Cape Cod, or of Seal Island off Nova Scotia. *Id.* Judge Gros's line crosses Georges Bank about 14½ miles west of the Chamber's line. *Id.*

<sup>188</sup> *Id.*, para. 47.

as regards the future development of international law, the future relations of the parties, changes in contemporary fishing patterns and a number of other areas. A few thoughts on some of these issues will simply be sketched here for future analysis.

From the perspective of development of the law of maritime delimitation, as has been remarked, the Chamber's Judgment is probably most significant for clarifying what is not relevant (although it did offer certain positive guidelines in terms of its emphases on geography and on equal division of disputed area taking account of relative coastal lengths, and so forth). It is not the purpose of this article to assess the validity of Judge Gros's contention that:

So far as its doctrine is concerned, the present Judgment can be summed up in four words: the result is equitable. This is tantamount to expecting States that come to the Court to accept this new basis of the function of the judge as one freed from the positive law he is charged to apply.<sup>189</sup>

There appears to be general agreement at least with the first sentence of this evaluation: the result is equitable. It might, nevertheless, have been helpful to have some clarification from the Chamber on certain central legal questions. The Chamber, for example, has said that the 1958 Convention on the Continental Shelf does not apply between its parties if they are seeking determination of a single maritime boundary, applicable to the water column as well as to the shelf; but it was never really explained whether this Convention went out of effect, and if so, whether it was superseded by customary law or rendered obsolete by changed circumstances, especially since the 1982 Convention on the Law of the Sea has not yet come into force (and has not even been signed by the United States). A number of factual issues were also left unresolved.

Then, too, the case may have highlighted a number of procedural concerns. In view of the disputes between the parties over factual questions such as fishing patterns and continental shelf permits and licenses, an interesting subject for future consideration seems to be the role of discovery in international legal proceedings. This suggestion is perhaps reaffirmed by the request made recently by Tunisia for the International Court of Justice to reopen its consideration of the *Tunisia/Libya* case based on newly discovered factual evidence. In conjunction with analysis of the scope of discovery, the role of experts in international legal proceedings might also be reexamined.

From the perspective of bilateral relations, having the Legal Advisers of both the United States Department of State and the Canadian Department of External Affairs arrayed against each other as Agents and adversaries in legal proceedings might not have been calculated to be optimal for the routine conduct of bilateral legal affairs (or for any other normal problems, considering the huge amounts of time that had to be

<sup>189</sup> *Id.*

devoted to the case on both sides!). However, the parties can continue their normal friendly relations, each remaining confident of the respect of the other for its multiple interests (including, of course, navigation and security interests) in the Gulf of Maine and other maritime areas.

From the point of view of the fishermen, some mutual restraint and sacrifice will be required, as the activities of Canadian fishermen and U.S. fishermen will necessarily affect each other. In particular, some U.S. fishermen were adamant in their opposition to the 1979 East Coast Fishery Resources Agreement, preferring to wait and take a gamble on gaining the whole of Georges Bank in the boundary litigation, and they are naturally somewhat disappointed in the result. One hopes that they will not now seek to assuage these feelings by trying to advocate disruptive measures in trade or other areas of normal bilateral friendly relations.

Finally, from the point of view of the fish, the *Gulf of Maine* decision, however interesting to international lawyers, may have little significance. Both Canada and the United States are notable for their concern with environmental problems, and particularly conservation, and they both have a clear economic self-interest in the conservation and sustained yield of the shared fish stocks of Georges Bank. Both countries—and their fishermen—should be able to recognize the need (and benefit) of cooperative conservation and management measures.

In the last analysis, to return to the original question here, equity is to some extent “in the eyes of the beholder.” The Chamber has produced a decision that the distinguished judges deem to be an “equitable result,” and that the United States and Canada have agreed in advance to accept as such. Yet, especially in a case like the *Gulf of Maine* where the primary focus of the dispute has been renewable living resources, the benefit to be achieved by both parties jointly and separately largely depends on their continued ability to cooperate. In short, the ultimate equity of the result to a considerable extent depends on the parties themselves.

## SOME PERSPECTIVES ON ADJUDICATING BEFORE THE WORLD COURT: THE GULF OF MAINE CASE

*By Davis R. Robinson, David A. Colson and Bruce C. Rashkow\**

### INTRODUCTION

On October 12, 1984, a five-member Chamber of the International Court of Justice rendered its decision in the maritime boundary dispute between the United States and Canada in the Gulf of Maine area.<sup>1</sup> The Chamber delimited the continental shelves and 200-nautical-mile fisheries zones by setting one line between the two countries off the East Coast of North America. The Chamber's Judgment, which under Article 27 of the Statute of the Court is considered as if it were rendered by the full 15-member Court, is likely to attract considerable comment. We will resist the temptation to add our views to that substantive commentary, leaving analysis for the time being to others not so closely associated with the case.

Our purpose in this article is to discuss a variety of procedural, administrative and tactical matters that bore upon the initiation, preparation and presentation of this case before the International Court of Justice. Since such matters are not dealt with in judicial opinions, they may be forgotten once a case is concluded. We believe that some of these experiences may be of more general interest, and we will describe them here while our memories are fresh.

### *Background*

The roots of the maritime boundary dispute in the Gulf of Maine area go back at least to the Revolutionary War. Indeed, some of the most contentious issues in the negotiations leading to the Treaty of Peace of 1783 related to East Coast fishing.<sup>2</sup> From that day to the present, United

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<sup>1</sup> Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12) [hereinafter cited as Judgment].

<sup>2</sup> Art. III of the Treaty of Peace of 1783, 8 Stat. 80, TS No. 104.

States and Canadian fishermen, and their governments, have carried on a continuing fisheries dispute<sup>3</sup>—of which the delimitation of the maritime boundary in the Gulf of Maine area has been but a part. Following the Truman Proclamation,<sup>4</sup> the dispute also ultimately involved conflicting claims by the United States and Canada to continental shelf jurisdiction in the Gulf of Maine area.

When the United States and Canada established 200-nautical-mile fishing zones in 1977, the dispute took on a new dimension. In the vicinity of Georges Bank, one of the world's richest fishing grounds, the claims of the two countries overlapped and presented an issue uncommon in fisheries disputes—the delimitation of a relatively distant offshore area over which each state asserted jurisdiction. The United States claimed that it was entitled to fisheries jurisdiction over all of Georges Bank, while Canada claimed that it was entitled to such jurisdiction over the northeastern portion of the Bank.<sup>5</sup> The active fishing in the disputed area by fishermen of both countries made it politically and legally important to resolve the maritime boundary dispute as soon as possible. Had the extension of fishing jurisdiction to 200 nautical miles not occurred in 1977, resolution of the ongoing continental shelf dispute might have been deferred for an indefinite period while development of other areas that held greater promise of oil and gas deposits was pursued. However, with the advent of the conflicting fishing claims, the ongoing and intense competition for the resources of the area exerted pressure on the two friends and neighbors to delimit the area in dispute.

At first, the United States and Canada attempted to negotiate a resolution. In mid-1977, the President of the United States and the Prime Minister of Canada appointed senior-level negotiators mandated to resolve the fishery and boundary issues. The negotiators sought a fishing agreement that would be separate from, and not be dictated by, the ultimate location of the maritime boundary.<sup>6</sup>

This effort culminated in 1979 with the signature of two treaties. The first treaty proposed a permanent arrangement for the management and allocation between United States and Canadian fishermen of the East Coast fisheries from Newfoundland to North Carolina. The second called for the submission of the location of the maritime boundary to a binding dispute settlement procedure. Neither treaty was to enter into force unless

<sup>3</sup> Annex 17 of the United States Memorial contains a list of 15 treaties or other international agreements concluded between 1818 and 1912 that related to U.S.-Canada East Coast fisheries.

<sup>4</sup> Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, Sept. 28, 1945, 10 Fed. Reg. 12,303 (1945), 3 C.F.R. 67 (1943-48).

<sup>5</sup> With 200 nautical miles considered as the outer limit, the overlapping claims of the parties resulted in a disputed area of 17,650 square nautical miles. Of this area, 5,450 square nautical miles fell within the 100-fathom depth contour of the Georges Bank area.

<sup>6</sup> The senior-level negotiators were Lloyd Cutler for the United States and Marcel Cadieux for Canada.

both did so.<sup>7</sup> Following signature, the fisheries treaty failed to achieve any significant measure of political support in the U.S. Congress. This impasse was thereafter described by the Canadian Minister for External Affairs as Canada's most serious bilateral issue with any country.<sup>8</sup>

The inauguration of President Reagan in early 1981 created an opportunity to break with the past. The new administration, seeing that there was no prospect for Senate advice and consent to ratification of the fisheries treaty, and aware that Canada was not prepared to renegotiate the already signed agreements, decided to propose to "de-link" the two treaties and to proceed only with the Maritime Boundary Settlement Treaty. This proposal was politically popular in the United States. The de-linkage on the U.S. side was legally accomplished when the Senate returned the failed fisheries treaty to the President<sup>9</sup> and unilaterally altered the Boundary Settlement Treaty in its resolution of ratification so that if Canada agreed, the Treaty could enter into force independently of the fisheries treaty.<sup>10</sup>

After several months, Canada accepted this proposal. On November 20, 1981, instruments of ratification were exchanged and the amended Boundary Treaty entered into force. Five days later, pursuant to the Treaty, the United States and Canada jointly submitted a Special Agreement to the International Court of Justice. Pursuant to Article 40 of the Statute of the Court, the parties requested that the Court establish a five-member Chamber under Article 26(2) of the Statute to hear the case. On January 20, 1982, the Court agreed. Simultaneous written pleadings were filed by the parties on September 27, 1982 (the Memorials); on June 28, 1983 (the Counter-Memorials); and on December 12, 1983 (the Replies). Two rounds of oral argument were presented by each side over a 6-week period in April and May, 1984.<sup>11</sup>

### *Summary of Judgment*

The Chamber's Judgment is 243 paragraphs long, considerably longer than the Judgments rendered by the Court in the *North Sea Continental*

<sup>7</sup> Maritime Boundary Settlement Treaty with Canada, TIAS No. 10204, and the Agreement on East Coast Fisheries Resources with Canada, S. EXEC. DOC. V, 96th Cong., 1st Sess. (1979). For a further description of the two treaties, see Feldman & Colson, *The Maritime Boundaries of the United States*, 75 AJIL 729, 760-63 (1981).

<sup>8</sup> Giniger, *Treaty Delay Snags U.S. Ties to Canada*, N.Y. Times, June 15, 1980, at A12, col. 1; Canadian Memorial, 2 Annexes, Ann. 46.

<sup>9</sup> De-linkage of the two treaties was accomplished by a message from the President to the Senate requesting the return of the fisheries treaty, a favorable report on the President's request by the Senate Foreign Relations Committee and the return of the fisheries treaty to the President by Senate resolution.

<sup>10</sup> MARITIME BOUNDARY SETTLEMENT TREATY WITH CANADA, S. EXEC. REP. NO. 5, 97th Cong., 1st Sess. (1981). Several additional technical changes were also made.

<sup>11</sup> From 1977, and throughout the pendency of the case, the United States and Canada informally agreed not to engage in law enforcement activities against the vessels of the other party in the disputed area.

*Shelf Cases*<sup>12</sup> and the *Tunisia/Libya Continental Shelf* case.<sup>13</sup> The Chamber based its delimitation of the boundary upon its geographical perspective of the case. The final line crosses Georges Bank halfway between the Canadian claim line and the northeast tip of the Bank. Since the Bank is wider on the U.S. side, the United States ended up with about 61 percent of the disputed part of the Bank. The smaller Canadian portion that is closer to Canada, however, may be as rich in fishery yields. (For the delimitation, see map 1, p. 542 *supra*.)

#### I. SUBMISSION OF THE DISPUTE TO THE CHAMBER

##### *Formation of a Chamber under the Statute and Rules of the ICJ*

In the negotiations that took place during the Carter administration, the United States and Canada chose to take the boundary case to a five-member Chamber of the International Court of Justice rather than to the full 15-member Court or to an independent ad hoc arbitral tribunal. The United States was first attracted to the Chamber procedure for the reasons set out by Eduardo Jiménez de Aréchaga in a 1973 article in the *American Journal of International Law* on the 1972 amendments to the Rules of Court.<sup>14</sup>

In that article, the then judge (and later President) of the International Court of Justice indicated that the Rules of Court had been modified to attract states to use the Chamber procedure that had been available for many years but never utilized. He suggested that the Chamber procedure combined the attractive elements of an international arbitration, where the parties can influence court procedure and the make-up of the tribunal, with the convenience of an established institution, where such matters as judges' salaries, courtrooms, registry, translation and interpretation and reproduction facilities are independently provided and funded.

This previously untested procedure proved appealing. The case was expected to raise a host of novel issues of law and fact and to require a degree of procedural innovation, especially since two nations from the common law tradition were involved. It was believed that the Chamber procedure would provide the parties the opportunity to submit the complex of historical, geographical, biological, environmental and other issues to a small group of judges with special experience in the area. We furthermore wanted to make good and appropriate use of the International Court of Justice as an institution and hoped that the first Chamber process would set a positive precedent for other nations in the peaceful resolution of their disputes.

<sup>12</sup> North Sea Continental Shelf Cases (FRG/Den.; FRG/Ice.), 1969 ICJ REP. 3 (Judgment of Feb. 20).

<sup>13</sup> Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 ICJ REP. 18 (Judgment of Feb. 24).

<sup>14</sup> Jiménez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AJIL 1 (1973).

Cost was also a factor in not resorting to an independently created ad hoc arbitral tribunal. The United States and Canada already were substantial contributors to the budget of the Court through their United Nations dues. Not only would the establishment of a separate ad hoc tribunal be expensive, but it would be time-consuming as well.

Throughout the negotiating process, there was a consensus that any boundary judgment resulting from a binding adjudication between the United States and Canada must be fair not only in substance, as a matter of law, but in perception as well. The decision in the case would be of great importance to the people in New England and Nova Scotia who were the most directly affected. The decision could also affect broader interests because of its precedential value. Thus, the Chamber procedure had the advantage of utilizing the institutional significance and established facilities of the International Court of Justice, while seeking convenience and innovation in presenting the case to a limited number of specially qualified jurists.

Article 17(2) of the Rules of Court calls for the President of the Court to consult with the parties about the make-up of a Chamber, which must contain the number of judges that the parties select.<sup>15</sup> Judge Jiménez de Aréchaga described the process as follows:

[T]he Statute does not restrict the scope of the consultations that may be carried out by the President with the parties. It would be in order for the President to consult the parties and to inform the Court of their views as to the Chamber's composition, and this is precisely what the new Rules envisage.

After the President reports on these consultations, the Court must always proceed to an election of the members of the Chamber by secret ballot, thus retaining ultimate control over the composition of any Chamber. However, from a practical point of view, it is difficult to conceive that in normal circumstances those Members who have been suggested by the parties would not be elected. For that it would be necessary for a majority of the Members of the Court to decide to disregard the expressed wishes of the parties. This would be highly unlikely since it would simply result in compelling the parties to resort to an outside arbitral tribunal or even to abandon their intention to seek a judicial settlement of the dispute.<sup>16</sup>

On January 20, 1982, the Court appointed a Chamber as requested by the parties, including Roberto Ago of Italy, Hermann Mosler of the Federal Republic of Germany, André Gros of France,<sup>17</sup> Stephen Schwebel of the United States and Maxwell Cohen of Canada as judge *ad hoc*.<sup>18</sup> The

<sup>15</sup> Statute of the International Court of Justice, Art. 26, para. 2.

<sup>16</sup> Jiménez de Aréchaga, *supra* note 14, at 3.

<sup>17</sup> Judge André Gros of France was elected to the Chamber just prior to the expiration of his term of office as a Member of the Court on Feb. 1, 1982. The Statute and Rules of Court permitted him to sit as judge on the Chamber after that date. *See* Jiménez de Aréchaga, *supra* note 14, at 4.

<sup>18</sup> In fact, the Court appointed a Chamber that included Judge Ruda who stepped aside in favor of Canada's judge *ad hoc*.



Chamber selected Judge Ago as President. The fact that the Chamber consisted only of judges from North America and Western Europe was criticized by some.<sup>19</sup> However, the parties did not in any way preordain that result, which occurred in the process of reaching a balance of experienced jurists that both sides could propose. Moreover, in our view, the parties should be free to select members of a Chamber within the Court's rules and prerogatives. The requirement that members of a Chamber should represent the "principal legal systems of the world," which appeared in the Statute of the Permanent Court, was deleted in 1945 when the ICJ Statute was drafted.<sup>20</sup> We believe that the make-up of a Chamber should be based upon the views of the parties as to its ability to settle the dispute between them in an acceptable manner—not upon some abstract notion of geographic balance or blending of various legal systems. The composition of a particular Chamber could, of course, be commented upon in debating the precedential impact of its decision on separate disputes between other nations.

### *The Special Agreement*

The purpose of a Special Agreement between two nations is to confer jurisdiction upon an international tribunal and to specify the question that the tribunal is asked to decide. While such agreements are negotiated between the parties, their terms can become a source of controversy during the adjudication of the dispute in issue.<sup>21</sup> In the *Gulf of Maine* case, there were several disagreements between the parties regarding the significance to the merits of the dispute of certain provisions in the Special Agreement. The Chamber and the parties also appear to have differed somewhat in delineating the relevant aspects of the question upon which the Chamber was asked to rule under the Special Agreement.

*The Single Maritime Boundary.* In this latter connection, the Special Agreement requested that the Chamber decide "the course of the single maritime boundary that divides the continental shelf and fisheries zones" of the two states.<sup>22</sup> In using the phrase "single maritime boundary," the United States had no intention of promoting a new legal concept or of adding to the legal lexicon. There were at least three reasons, from the U.S. perspective, for the appearance of this term in the Special Agreement.

First, the phrase reflected a common judgment of the United States and Canada that there should be one maritime boundary for all jurisdictional purposes in the Gulf of Maine area. It is conceivable to have

<sup>19</sup> Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Constitution of Chamber, 1982 ICJ REP. 3 (Order of Jan. 20) (dissenting opinions of Judges Morozov of the Soviet Union and El-Khani of Syria).

<sup>20</sup> Jiménez de Aréchaga, *supra* note 14, at 2-3.

<sup>21</sup> For example, one needs only to note the controversy reflected at paragraphs 22-31 of the Judgment in the Tunisia/Libya case, 1982 ICJ REP. at 37-41.

<sup>22</sup> Special Agreement, Annex I to the Maritime Boundary Settlement Treaty, *supra* note 7, Art. II.

different lines for different jurisdictional purposes, for example, one for the continental shelf and another for fisheries jurisdiction. Indeed, one can argue that the relevant considerations for the one are not necessarily the same for the other. But different lines for different purposes can create management difficulties and lead to new disputes.

Second, we believed that it was in the U.S. interest not to limit the considerations in this case to those related solely to continental shelf delimitation.<sup>23</sup> And third, while both the United States and Canada had accepted the exclusive economic zone concept during the negotiations at the Third United Nations Conference on the Law of the Sea, the United States was not prepared formally to refer to such a zone on a bilateral basis when this provision of the Special Agreement was negotiated in early 1979.<sup>24</sup> Thus, a different term—single maritime boundary—was used. By the time the case was ready for decision in 1984, however, both the United States and Canada had expressed to the Chamber their view that the line it was delimiting would be equivalent to a single exclusive economic zone boundary.<sup>25</sup>

In rendering its opinion, the Chamber appears to have been careful not to set a precedent that might unnecessarily preempt the full Court from ruling as it saw fit in another case on the delimitation of the exclusive economic zone. Accordingly, the parties' use of the phrase "single maritime boundary" may have ultimately proved useful to the Chamber in rendering its Judgment.

*The Starting Point and Terminal Area.* The Special Agreement between the United States and Canada identified the landwardmost point of the boundary to be delimited by the Chamber, and the seaward area in which the boundary was to terminate. These provisions also resulted in some controversy.

The starting point was defined by specific geographic coordinates in Article II of the Special Agreement. It lies about 30 nautical miles from the U.S. and Canadian coasts in the northern corner of the Gulf of Maine. Canada argued that the starting point reflected an understanding by the parties that the boundary was to extend in a southwesterly direction, as proposed by Canada, rather than the southeasterly direction proposed by the United States. Canada's argument was premised on the fact that the starting point is some 39 miles southwest of the final point of the agreed territorial sea boundary that terminates in Grand Manan Channel between

<sup>23</sup> Had the question been limited to the continental shelf, for example, Article 6 of the 1958 Convention on the Continental Shelf (15 UST 471, 499 UNTS 311) would, in our view, have played an obviously more important role in the case.

<sup>24</sup> The United States did not formally recognize the exclusive economic zone until President Reagan promulgated such a zone on Mar. 10, 1983. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).

<sup>25</sup> Canadian Memorial, para. 15; Canadian Counter-Memorial, paras. 39-40, 464-465. Presentation of United States Counsel John R. Stevenson, ICJ Doc. C 1/CR 84/24, at 26-37 (May 9, 1984).

the Maine coast and Canada's Grand Manan Island (see map 1, p. 542 *supra*).

The United States argued that its participation in the Special Agreement did not constitute any recognition of the merits of Canada's boundary position. We maintained that the starting point was not intended to have any relevance to the direction that the boundary was to take. We pointed to the history of the dispute to support the proposition that the starting point was based on the desire of the parties to preserve their positions in regard to another dispute over the ownership of Machias Seal Island and North Rock. These lie in the gap between the international boundary terminus and the starting point under the Special Agreement,<sup>26</sup> and involve a dispute that the United States and Canada had not agreed to submit to binding settlement.<sup>27</sup>

Article II of the Special Agreement required the Chamber to terminate its delimitation in a large area triangular in shape, seaward of Georges Bank (see map 1, p. 542 *supra*). The triangle was intended to indicate how far seaward the Chamber was to go in drawing the boundary. In selecting the triangle approach, the parties decided not to ask the Chamber to draw the line to the permissible outer limit of the continental shelf (or continental margin), an issue that was unsettled when the Special Agreement was negotiated in 1979. To ask the Chamber to draw the line to a particular point in the 200-nautical-mile zone raised different problems: the nearest point or the furthest point, or the point where the limits of the respective 200-mile zones might cross (a point that can only occur on an equidistance line; since the United States opposed the use of equidistance in this case, any such crossing point at the specified outer limit was unacceptable to it). In the Special Agreement, the parties agreed that the Chamber should terminate the line anywhere that it chose in the triangle, which in the view of the United States avoided any prejudice to the arguments of either party or to the later extension of the line to the limits of national jurisdiction.

## II. PREPARATION OF THE CASE

### *Vision of the Case*

As with any suit, the legal practitioner called upon to prepare a case before the International Court of Justice must focus early upon the scope and complexity of the case as well as the resources that the client must devote to its preparation and presentation. As in any case, it is necessary to identify as early and as completely as possible the legal and factual

<sup>26</sup> See 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 672-73; United States Reply, paras. 237-239.

<sup>27</sup> The starting point constituted the most landward point of intersection of the first published boundary claims of both states at the time of notification of their 200-nautical-mile zones in 1976.

issues that are likely to arise, the factual evidence and legal analysis that are needed to persuade the Court, and the research that is required to produce that evidence or analysis.

In considering these questions in the *Gulf of Maine* case, we examined with great care, as one would expect, the pleadings in previous related cases before the Court. The most pertinent of these cases involved delimitation of the continental shelf. The pleadings in the first of these cases, the 1969 *North Sea Continental Shelf Cases*,<sup>28</sup> are relatively compact documents that contain some, but not many, graphics and a limited number of annexed materials. These pleadings appear to be producible on modern word-processing and reproduction equipment available in most offices.<sup>29</sup> While the pleadings in the 1977 *Anglo-French Continental Shelf* arbitration<sup>30</sup> have never been made public, consultations with some persons involved in that case confirmed that those pleadings did not differ substantially in size and scope from those in the *North Sea* cases.

The pleadings in the 1981 *Tunisia/Libya Continental Shelf* case before the International Court of Justice introduced a measure of complexity reminiscent of large-scale, commercial litigation in U.S. courts.<sup>31</sup> The Memorial, Counter-Memorial and Reply were about five to seven times as long as any corresponding written pleadings in the *North Sea* cases, and were supported by numerous detailed scientific studies prepared by eminent authorities for the purposes of the case. Furthermore, the graphics, including statistical presentations, were of a different order of magnitude.

Having watched Canadian efforts in various forums, we knew on the U.S. side that we faced a formidable opponent that would spare nothing in the preparation and presentation of its case. The United States was of like and determined mind, but it kept an eye to economy wherever feasible.

The written pleadings of both sides together take up three feet of shelf space, including many detailed annexes, statistics, maps and charts. The Chamber might have preferred less. Yet, had either side left something unsaid or unexplored, those with the most at stake would be asking today whether not to have done so could have made a difference in the outcome.

### *Organization of Effort*

*Personnel.* As the *Gulf of Maine* case required a major organizational effort by the United States in the summer of 1981, it became imperative

<sup>28</sup> 1968 ICJ Pleadings (1 and 2 *North Sea Continental Shelf*).

<sup>29</sup> The Court requires that 125 copies of each written pleading be filed at the same time as the original certified copies. This requirement puts a premium on reproduction facilities.

<sup>30</sup> Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decisions of 30 June 1977 and 14 March 1978, 18 R. Int'l Arb. Awards 3, 18 ILM 397 (1979). See Colson, *The United Kingdom-France Continental Shelf Arbitration*, 72 AJIL 95 (1978).

<sup>31</sup> The written pleadings in the *Tunisia/Libya* case were made public at the beginning of oral argument in that case on Sept. 16, 1981, in the midst of our early preparations.

quickly to identify the various individuals, both within and without the Government, that would assist in the preparation and presentation of the U.S. case.

Because of its presidential mandate and special expertise, the Department of State has been in charge of representing the United States before international tribunals for 200 years. As the Legal Adviser of the Department, Davis Robinson was named by the Secretary of State as the United States Agent in charge of the case.<sup>32</sup> David Colson, the Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs, who had played a critical role in the *Gulf of Maine* dispute and other U.S. maritime boundary matters since 1976, was appointed Deputy Agent. Bruce Rashkow, head of the then Marine Resources Section, Land and Natural Resources Division, Department of Justice, with extensive experience in domestic federal/state maritime boundary disputes, accepted a transfer to the State Department as Director of the Office of Canadian Maritime Boundary Adjudication.

The staffing of the case required some fancy bureaucratic footwork. We reveal no secret when we say that the personnel system of the U.S. Government is not known for its immediate reaction to demands for significant increases in office staffing. When the decision was made that legal staffing would be most economical and efficient if concentrated among the in-house experts, we nonetheless received the necessary support on a timely and affirmative basis. The State Department made two new lawyer's positions available, the Navy Judge Advocate General Corps assigned two officers to the project, and the Coast Guard also recruited an officer to work on the case. Thus, a staff office of five attorneys, plus the office director, was established.<sup>33</sup> In addition, the National Ocean Service of the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce assigned a cartographer to the team. The Geographer's Office in the Department of State, and other personnel from NOAA and the Legal Adviser's Office, assisted on nearly a full-time basis.<sup>34</sup>

An early decision was taken in the fall of 1981 to involve legal experts from outside the Government to provide an independent source of comment and guidance. Five such individuals played an especially important role: John R. Stevenson, former Legal Adviser to the Department of State and United States Ambassador to the Third United Nations Conference on the Law of the Sea, who led the group; Mark B. Feldman, former Deputy Legal Adviser, who for many years had principal supervisory responsibility for the *Gulf of Maine* dispute within the U.S. Government;

<sup>32</sup> Under Article 42 of the Statute, a party before the Court is represented by an Agent.

<sup>33</sup> In addition to Mr. Rashkow, the members of that office were LCDR Peter Ward Comfort, U.S. Navy; Mary Wild Ennis; Lt. Neil F. Gitin, U.S. Navy; Ray A. Meyer; and Lt. Brian P. Flanagan, U.S. Coast Guard.

<sup>34</sup> We would particularly single out Michael J. Danaher, Richard H. Davis, William Hezlep, Jonathan T. Olson, Sandra Shaw, Robert W. Smith and Robert L. Edwards.

Ralph Lancaster, a nationally known litigator from Portland, Maine, with a unique perspective on the region of the United States most affected by the case; Professor John Norton Moore of the University of Virginia Law School, a former United States Ambassador to the Third United Nations Conference on the Law of the Sea and Director of the Center for Ocean Law and Policy; and Professor Stefan Riesenfeld of the University of California Law School, one of the outstanding scholars in the law of the sea and formerly Counselor on International Law to the Office of the Legal Adviser in the Department of State.

It was also decided at the outset to engage a number of foreign legal consultants. There were several considerations that went into U.S. thinking in this regard. We wanted to obtain the widest and most sophisticated insight into practice before the Court. We also wanted to ensure that the preparations were compatible with the different legal traditions reflected by the members of the Chamber. These foreign consultants were most helpful in discussing tactics and strategy and in making detailed comments upon the drafts of the written and oral pleadings that were initially prepared in-house.

In addition, many other distinguished U.S. lawyers, historians, geographers, biologists, geologists, marine scientists, economists and persons from other disciplines rendered assistance to us on a regular basis throughout the case. In all, nearly a hundred professionals contributed to the U.S. case.

Happily, this organization withstood many tests and held together throughout the case. It was based upon a normal chain of command, but it worked largely by consensus. Its mode of operation included the preparation of drafts of a pleading by the staff attorneys under the direction of the Deputy Agent and the Office Director. These would be reviewed in detail by the Agent, redrafted and then transmitted to the outside U.S. advisers for comment. Their comments would be received in writing and at ad hoc meetings held to thrash out differences. A minimum of three or four iterations took place for each pleading.

*Budget.* We understand that the United States and Canada spent approximately the same amount of money on the preparation and presentation of their case: about U.S. \$7 million each. In the U.S. Department of State, these funds were used for several purposes: for transfer payments to other offices within the Government for extraordinary services; for materials, particularly word-processing equipment; for printing and cartographic costs; for contracts with individual professors or academic institutions and with scientific and technical advisers and consulting organizations; for contract fees for nongovernment lawyers; for travel costs; and for the cost of moving and maintaining the 35-member U.S. team in The Hague for a 2-month period in the spring of 1984 during the oral argument of the case.

Members of the New England congressional delegation were especially helpful in assuring that we had an appropriate level of funding designated for the case.

*Interagency Coordination.* The preparation of the case necessarily involved the interests and expertise of various U.S. Government agencies. In the past, differences had emerged over priorities and strategies in achieving U.S. objectives in the dispute. However, when it was clear that the matter was to be adjudicated before the International Court of Justice, differences were put behind and the Government worked effectively in preparing the case. In particular, after the factual, scientific and technical requirements were identified, the Departments of Commerce and the Interior and the Coast Guard unhesitatingly mobilized their resources to fulfill those needs. Because of the novelty, complexity and importance of issues dealing with fisheries and, more generally, the marine environment, NOAA in particular devoted substantial resources to the case over a 2½-year period. We also enjoyed the full cooperation of other concerned elements of the Government throughout the case, including the Departments of Justice and Defense.

#### *Discovery*

The United States collected reams of information relating to its boundary position in the years preceding the submission of the dispute to the Court. Nonetheless, considerable development of the facts remained to be done once the dispute was submitted to adjudication. As the parties are expected to work out such matters between themselves where possible, the Rules of Court provide few procedures for discovery. Thus, there are no provisions in the Rules comparable to those found in the U.S. legal system relating to interrogatories or subpoenas to produce documents or testimony. There is only a general rule in Article 62 of the Rules of Court authorizing the Court to request evidence for itself or an explanation from the parties concerned. In this case, the Chamber was presented with hotly contested and complex factual issues that raised evidentiary questions of a scope generally unknown to international tribunals. On the one hand, the United States relied upon factual assertions, disputed by Canada, regarding fisheries activities of the parties and the unique marine environment of the Gulf of Maine area, particularly the division of fish stocks at the Northeast Channel. On the other hand, Canada relied upon factual assertions regarding continental shelf activities in the Gulf of Maine area that were contested by the United States.

*Fisheries.* At an early point in the case, the United States encountered difficulty in obtaining data relating to Canadian fishing activities from the Canadian Department of Fisheries and Oceans. The Canadian authorities early in the case asked the United States for unpublished information relating to the fishing activities of U.S. fishermen. In the absence of any requirement to respond to discovery requests, the United States and Canada proceeded to search for and develop the relevant facts as best they could.

After the parties filed their Memorials, Canada in correspondence through the Court asserted that the United States had failed to provide

data to substantiate certain of its factual assertions. Canada sought informally to utilize the Chamber's general authority to request information from the parties and to require the United States to respond even though much of the information sought did not, in our view, relate to assertions that the United States had made in its Memorial. The United States responded through the Court that the Canadian request amounted at one and the same time to an unauthorized answer to the U.S. Memorial and to a request for information not authorized by the Rules of Court. Nevertheless, in order to be responsive, we provided Canada with pertinent information.<sup>35</sup>

*Continental Shelf Activities.* In the same correspondence through the Court, Canada requested information relating to geophysical exploration by U.S. companies in the Gulf of Maine area in the 1960s. Canada sought this information to support its assertion that the United States in the administration of its continental shelf program had acquiesced in Canada's claim to the northeast portion of Georges Bank by allegedly restricting the activities of U.S. companies to the United States side of Canada's claimed equidistance boundary. Canada requested that the United States supply it and the Chamber with technical maps depicting exploration authorized under U.S. permits.

We concluded that while the information technically was not proprietary in nature, we should seek to provide it to Canada and the Court in a confidential manner. However, the Chamber was reluctant to establish a precedent. Before the end of the oral hearings, Canada and the Chamber were provided with the data without any restriction. For the future, the Court may wish to develop a means by which such material may be disclosed to the Court on a confidential basis.

#### *Development of Pleadings*

The International Court of Justice is a tribunal of first and last resort. Thus, it does not benefit from a system of lower court rulings that crystallize the issues and put into perspective the factual assertions of the parties. In view of the paucity of rules and procedures to test relevance, parties before the Court enjoy great leeway in the presentation of their cases.

The Court lacks readily available resources to cope with cases involving complex factual issues. Judges on the Court do not have personal assistants, such as law clerks. Moreover, while the Rules of Court permit the appointment of experts to make findings,<sup>36</sup> this authority has been employed sparingly. Finally, in a court where only sovereign states can be parties, the judges in a given case may sense pressure to arrive at a decision that is acceptable to all.

<sup>35</sup> The relevant correspondence is found in Annex 15 of the United States Counter-Memorial.

<sup>36</sup> See, in particular, Art. 67 of the Rules of Court, reprinted in 73 AJIL 748, 769 (1979).



*Expanding One's Claim.* The jurisprudence until the *Gulf of Maine* case suggested that maritime boundaries are preexisting. The role of the law was seen as identifying the boundary that exists, rather than determining a line *de novo*.<sup>37</sup> However, we are unaware of any modern international maritime boundary adjudication where a state received the boundary that it claimed. That experience confirms that claimants are not likely to receive what they request, but rather a compromise of some sorts. Thus, it may serve the interest of a party to claim the maximum to which it is conceivably entitled.

This is an unfortunate bit of realism. Maritime boundaries implicate the sovereign rights and jurisdiction of states. Boundary claims are serious business. States have been known to fight wars over such matters. It is difficult, at best, for politicians to split the difference when sovereignty claims are concerned, but not impossible for judges to do so when the states involved have the will and political basis to submit a boundary dispute to adjudication.

In 1977, in the midst of negotiations to resolve the dispute, the United States was informed that Canada intended to expand its 1976 claim on Georges Bank. Canadian attorneys argued that Cape Cod should be disregarded for the purpose of determining an equidistance line and thus moved Canada's claim line to the west, adding 2,900 square nautical miles to the area of Georges Bank already claimed by Canada.

From 1977 until 1981, the United States did not expand its claim. First, it was argued that any expansion during the negotiating process was contrary to the principle that good faith negotiations are to be conducted with a view to reaching an agreement. Second, the United States asserted that its initial Northeast Channel claim was the true boundary that existed in the law. Third, it was thought at that time that any expansion of our claim would be perceived—rightly or wrongly—as overreaching, a perception that the United States had of Canada's expansion of its claim but did not wish to have associated with any expansion of our own.

In late 1981, when the Boundary Treaty had been ratified and the case submitted to the Court, the U.S. side decided that it was an appropriate time to claim as large an area as we could meritoriously argue as ours, especially in light of recent developments in the case law. Thus, we concluded that an adjusted perpendicular to the general direction of the coast in the Gulf of Maine area was the appropriate legal theory rather than a line of deepest water as set forth in the U.S. 1976 claim. As a result of the expansion, the United States claimed larger areas, but in the central area in dispute it did not expand its claim so as to assert jurisdiction northeast of Georges Bank.<sup>38</sup>

<sup>37</sup> We recall the words of the Court in the *North Sea* cases where the shelf is said to exist *ipso facto* and *ab initio*. 1969 ICJ REP. at 29.

<sup>38</sup> The Judgment in the *Tunisia/Libya* case provided a sound legal basis in our view for changing the U.S. position. That Judgment rejected natural prolongation in a geological sense and emphasized geographical factors. The Canadians, for their part, cited the Judgment

Whether expansion of the U.S. claim resulted in a better outcome for the United States is difficult to judge from the Chamber's decision. We believe for our part that the theory of our expanded claim not only was legally correct, but also changed the perspective of the case by moving its center of gravity further to the north and consequently placing Canada on the defensive. The Court's line across Georges Bank falls at the midpoint between the expanded Canadian claim line of 1977 and the northeastern tip of Georges Bank. We do not see that either side was penalized for expanding its original negotiating position. If this perception is correct, one might question whether the result will further the goal of reducing differences between states rather than enlarging them.

*Proof of Facts.* During the *Gulf of Maine* case, we faced the likelihood that the Chamber would engage in only limited fact-finding. International tribunals tend to focus on factual assertions that are indisputable. For instance, in a maritime boundary case, the geography that is reflected on modern maps and charts is not likely to be questioned by either party and can thus constitute an irrefutable factor in any decision. Documented and uncontested historical facts are also likely to gain favor.

Marine biology, geology and economics, where contested, are a different matter. Obviously, they are all disciplines that are well understood. Most scientists from a particular discipline will agree on a basic set of assumptions, within certain parameters. Governments consistently rely upon such assumptions in making a wide variety of determinations. For example, most marine biologists would not hesitate to support the general proposition that Georges Bank is an integrated oceanographic unit. Yet as the United States gave this proposition legal relevance in support of its claim to all of Georges Bank, Canada took exception and focused on the trees rather than the forest. Similarly, the United States took strong exception to Canada's socioeconomic arguments on the basis of both their accuracy and their relevance. As a result, the Chamber generally dismissed such issues, and instead relied on considerations that were not and could not be contested by either side.

While the Chamber found that only geographical facts were generally relevant to the drawing of a single maritime boundary in the Gulf of Maine area, it concluded that other facts may be used to check the equitable character of any boundary so determined.<sup>39</sup> Therefore, lawyers handling such cases will undoubtedly continue to present factual information that may be disputed by the other side. They will do so to ensure completeness for testing purposes despite the likelihood that they will encounter the same difficulty in convincing the Court of the validity of complex and contested factual assertions as the United States did with regard to fisheries and as Canada did with regard to socioeconomic considerations.

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in the *Anglo-French* case as the legal basis for the 1977 expansion of Canada's claim, a proposition that the United States contested.

<sup>39</sup> Judgment, 1984 ICJ REP. at 278.

### III. ORAL ARGUMENT

Oral argument in the International Court of Justice presents a number of substantive and procedural challenges.

#### *Choice of Counsel*

Because of the manner in which oral presentations are made before the Court, we had to consider its effect upon our choice of counsel to argue the case. While the Court is empowered to ask questions of counsel during argument, over the years the Court has generally asked few, if any. Moreover, when judges do ask questions, the Court has usually reserved them to the end of both rounds of oral argument. Traditionally, the Court has not expected an immediate answer but rather allows an opportunity for considered reflection. As a rule, the answers are presented at a subsequent session and are read from a prepared written text. Because of the need for simultaneous translation, the practice before the Court is to give the translators a copy of all written statements prior to their presentation. While counsel may depart from their written statements, they are expected to do so sparingly.

With these factors in mind, we had to decide quite early whether to involve our foreign consultants in the oral presentation. We ultimately concluded that the United States oral argument before a Chamber of the International Court of Justice should be presented entirely by United States citizens.<sup>40</sup>

#### *Order of Argument*

Normally, the order of appearance at oral argument before the Court is that country *A* presents its case in chief, country *B* presents its case in chief, country *A* responds, and then country *B* responds. The Special Agreement between the United States and Canada did not designate either side as plaintiff or defendant. It provided that each round of written pleadings was to be submitted simultaneously but did not address the order of oral argument. Thus, we had to determine which country would be first and which would be second. Neither the history of the case nor the Special Agreement offered any guidance. Nor did the Rules of Court. The President of the Chamber urged the parties to resolve the issue between themselves.

The U.S. team devoted a great deal of thought to whether it was preferable to go first or second. Views differed. We understand that Canada had similar difficulties. In the end, we decided that it was slightly better to go second. As we saw it, the decision in this case could rest in

<sup>40</sup> We were originally concerned that if we did not use foreign counsel, Canada, which had determined that foreign counsel would participate in its oral presentation, might gain some edge. Our concern was put to rest after consultation with our foreign advisers. We do not believe that the outcome of the case was affected one way or the other by either side's handling of the question.

large part on U.S. factual arguments that Canada disputed. On balance, it appeared preferable to have the last word not only to emphasize the importance of these issues but, if we could, to dispel any confusion.

Each side was reluctant to reveal its preferred choice as to order without knowing the position of the other. Finally, after considerable discussion, the two Agents agreed on a procedure for making the choice. The Agents would write their choice of first or second on a slip of paper. These slips would be exchanged. If the choice differed, the die was cast. But if both made the same choice, a coin would be flipped to determine which side would succeed in its selection. The parties agreed, however, that if they both chose first, they would jointly request that the Chamber allow each side to make a brief opening statement before the beginning of the normal two rounds of argument, so as to mitigate the perceived advantage of having the first word. Similarly, if both sides chose second, they agreed to request that each side be permitted a short closing statement following the completion of the normal two rounds of argument, so as to mitigate the perceived advantage of having the last word.

A month or so before oral argument began, the Agents of the parties met in a hotel lobby in The Hague and exchanged slips of paper on which they each indicated a preference for having the last word. The U.S. Agent flipped a 2-guilder Dutch coin. The Canadian Agent called heads. The coin came up tails. The United States was destined to go second and thus have the last word. In the end, when the President of the Chamber requested that the parties not press what the Chamber viewed as an extraordinary request for a third round of oral presentations, the parties did not do so. Upon reflection, we doubt whether who went first and who went second had any bearing on the way the Chamber looked at the issues in this case or on the outcome.

We should note that with two rounds of argument, whoever goes second has the task of responding twice to the other side, whereas whoever goes first only responds once. This factor increases the burden of going second, since statements prepared in advance by the party going second for either round require considerable quick revision to take into account the opening argument of the party going first.

#### *Schedule of Argument*

Another procedural matter of some complexity that arose in connection with oral argument was the issue of schedule. We had to address how much time would be devoted by each side to oral argument as well as the length of time that should be allowed for preparation between the presentations of the two sides.

The Chamber and the parties generally preferred one morning or afternoon session per day, although double sessions did occur. Each session amounts to approximately 2 hours and 40 minutes of argument. The President of the Chamber strove for uniformity of treatment. With continuing good will, the parties were able to work out a schedule that

met the anticipated needs of both sides. In the end, each side used eight sessions to present its case in chief and four sessions in its second round of oral argument. The agreed schedule allowed intervals at the end of each side's round that were intended to permit the other adequate time to prepare its response. The schedule became disrupted when Nicaragua filed its case against the United States.<sup>41</sup> A hearing on Nicaragua's claim for interim measures took precedence under Article 74(1) of the Rules of Court. As a result, we telescoped the previously agreed schedule for the second round of oral argument in the *Gulf of Maine* case by holding several two-a-day sessions and one Saturday session.<sup>42</sup>

#### *Witnesses and Experts*

Prior to oral argument, both sides had contemplated using expert witnesses in support of their arguments. Few cases before the Court have involved recourse to witnesses and experts. The Rules of Court provide little guidance on the procedures to be employed. Consequently, the parties held consultations on recommendations to be made to the Chamber regarding the presentation of testimony, the conduct of cross-examination and the possibility of rebuttal witnesses. In the end, only the United States called an expert or witness.

The United States determined that its case could be enhanced by having a credible expert support the U.S. arguments on the nature of the marine environment. We recognized that, for the most part, prior cases had never addressed the kind of factual issues that our legal argument concerning the marine environment presented. We knew that for our position to succeed, the facts on which it was based had to be understood and accepted. While the calling of an expert entailed certain risks, we saw little to be lost. We believed that there was a chance that the personal credibility of our expert witness and our ready willingness to subject him to cross-examination might encourage the Chamber to give more serious consideration to the U.S. arguments, which Canada was vigorously disputing.

Dr. Robert Edwards, former Director of the Northeast Fisheries Center of the National Oceanic and Atmospheric Administration at Woods Hole, was chosen for this task. Dr. Edwards was an important member of the U.S. team during the preparation of our written briefs, having been primarily responsible for the marine environment annex that appeared with the U.S. Counter-Memorial. As expert witness, he was examined by United States counsel through a series of prepared questions and answers, and cross-examined by Canadian counsel. We suspect that the effort, on

<sup>41</sup> Nicaragua filed its Application on Apr. 9, 1984 during the midst of Canada's first-round presentation. Argument was heard on Nicaragua's request for interim measures on Apr. 25 and 27, 1984 (*Nicaragua v. United States of America*).

<sup>42</sup> We do not believe that the disruption in schedule or the additional time for Canada's preparation of its second round of oral argument made any difference in the outcome of the case.

balance, did not have a substantial effect on the outcome of the case one way or the other. In its decision, the Chamber chose not to grapple with the intricacies of this complex subject, just as it chose not to seize upon the socioeconomic arguments advanced by Canada that were contested by the United States.

### *Illustrative Aids*

*Presentational Devices.* Another practical issue of consequence involved the manner in which illustrative material was to be presented to the Chamber during oral proceedings. The Courtroom of the Peace Palace in The Hague does not lend itself to the use of slides or other illustrative material because of its lighting system, seating arrangement and windows. In addition, because of the furniture arrangement, any display screen is at some distance from the judges' bench and must fit in a narrow space between rows of chairs made available for members of the audience.

Both slide and overhead projectors are ineffective because the large windows in the Courtroom have no shades. Anticipating that we would want to display numerous illustrations, including maps and graphs, during the oral proceedings, we developed two alternatives. One was a self-contained back-lit slide projection system. The other employed large poster boards, some as large as 60 by 80 inches, that were positioned on a large, specially constructed rack. In the end, we decided to use the poster boards.

The Canadians found themselves in the same quandary. They developed a mechanical light box, 3 or 4 feet square, which could accommodate a number of large transparencies. They were rolled over the screen by remote control as Canadian counsel made their presentations.

We might note that the mode of courtroom presentation loses some of its importance since the judges tend to focus upon the bench copies of the illustrations that by tradition the parties prepare and present in advance of the hearing at which the illustrations are shown.

*Films.* After the filing of the Memorials, Canada decided to prepare a film showing the "physical and human geography" of Nova Scotia for possible presentation during oral argument. Canada cited as precedent Tunisia's film of the coastal fisheries of the Gulf of Gabes shown during the *Tunisia/Libya* case. Canada considered that a film might effectively reply to the U.S. rebuttal of Canada's arguments regarding the socioeconomic conditions in southwest Nova Scotia and the region's alleged economic dependence upon Georges Bank fishing.

After Canada had informed the Chamber and the United States of its proposal, we responded that it would be inappropriate for such a film to be allowed into evidence. We objected to Canada's proposal as a matter of principle on six grounds:

- such a film would have attributes of an on-site visit, which the parties had originally agreed to discourage;
- the past practice of the Court was not to approve the introduction

of a film that was unilaterally and selectively prepared by one party over the objection of the other;

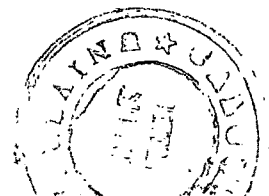
- such a film would not be subject to the procedural safeguards in the Rules of Court that relate to on-site visits or to the objectivity that can be said to be associated with a film produced at some earlier time for a purpose unrelated to the adjudication;
- the introduction of a film into evidence over the objection of one party raised important evidentiary questions for the Chamber, such as the testing of the credibility of the film where no procedural safeguards would surround its preparation;
- the subject matter of the film was legally irrelevant; and
- the introduction of such a film produced for the case would detract from the judicial character of the proceedings and would establish a bad precedent that would increase the cost of adjudication before the Court.

Canada took exception to all these arguments. Several special consultations with the President of the Chamber succeeded in resolving some issues—for instance, Canada agreed to provide the United States with a copy of the film as soon as it was produced.

The matter of principle was never resolved. Canada maintained its right to introduce the film to the last and the United States maintained its original objections after having viewed the film. The Chamber was relieved of deciding the issue when Canada chose not to seek to introduce the film during oral argument, citing the delay occasioned by the *Nicaragua* intervention as the reason for this decision.

#### CONCLUSION

Perhaps this recounting of some of the procedural issues that we faced will be of solace to practitioners in other cases; they will know that kindred souls once also struggled with such problems. While none of our observations has much to do with the law of maritime boundaries as articulated by the Chamber, we who were so close to the contest would prefer for the time being to allow others to comment on the substance of the case.



## COMMUNITY LAW, INTERNATIONAL LAW AND THE ITALIAN CONSTITUTION

By Antonio La Pergola and Patrick Del Duca\*

For more than 20 years the Italian Constitutional Court and the Court of Justice of the European Communities have disputed the proper relation between Community and national law. In *S.p.A. Granital v. Amministrazione finanziaria*,<sup>1</sup> the Constitutional Court recently adopted a position consistent with the Community Court's view of the supremacy of Community law. Italian constitutional law doctrines on international law profoundly affected this development and may in turn be altered as the implications of the Constitutional Court's view of Community law are worked out.

One purpose of the present discussion is to show how the Constitutional Court reached its present view of Community law and to establish a possible framework for debate about whether to extend this approach to the application of international law at large. The Constitutional Court's jurisprudence is of obvious, but not exclusive, interest to Italian jurists and to those concerned with the European Communities. Although there may be a hint of a federal character in Italy's relationship to the European Communities, for the present the European Communities are not comparable to a well-developed federal union such as the United States. Nonetheless, an analysis of how one member state of the European Communities

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<sup>1</sup> *S.p.A. Granital v. Amministrazione finanziaria*, Judgment No. 170 of June 8, 1984, 1984 *Giurisprudenza costituzionale* [Giur. cost.] 1098. For an English translation with a Note by Giorgio Gaja, see 21 *Common Mkt. L.R.* 756 (1984). For Italian commentary, see Berri, *Composizione del contrasto tra Corte costituzionale e Corte di giustizia delle Comunità europee*, 136 *Giurisprudenza italiana* I, pt. 1 at 1521 (1984); Sotgiu, *L'Applicabilità 'diretta' del diritto comunitario*, 34 *Giustizia civile* I, at 2359 (1984); Sperduti, *Una Sentenza innovativa della Corte costituzionale sul diritto comunitario*, 20 *RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE* 263 (1984); Tizzano, *La Corte costituzionale e il diritto comunitario: Vent'anni dopo* . . . , 107 *Foro italiano* I, at 2063 (1984).

A word is in order about citation of decisions of the Corte costituzionale. Italian practice is to refer to decisions by number. Party names are used in this article for convenience in referring to the principal cases. Dates of decisions are the dates they were deposited with the clerk of the Court (cancelleria). The *Raccolta ufficiale delle Corte costituzionale* [Rac. uff.] reproduces the full text of decisions. *Giurisprudenza costituzionale* is a legal journal that publishes the decisions of the Court with commentary. It generally reproduces the full text. Since 1976 it has been published in two parts. Part I contains texts of decisions and comments. Part II publishes questions referred to the Constitutional Court by other courts. All references in this article are to part I. Other Italian legal journals publish decisions of the Court accompanied by comments on an occasional basis.

Article 13 of Law No. 839, Dec. 14, 1984, *Gazzetta ufficiale della Repubblica italiana* [Gaz. uff.] No. 345, Dec. 17, 1984, initiated the publication of the full text of Constitutional Court decisions in the *Gazzetta ufficiale*. Previously, the *Gazzetta ufficiale* gave notice of Constitutional Court decisions but did not provide the full text.



has accepted the supremacy of Community law should stimulate reflection about supremacy and judicial comity in other kinds of unions of states. We focus on potential implications of the approach to Community law in Italy in order to furnish a complete picture of how far-reaching the effects of Italy's encounter with Community law have become. We leave to readers the task of drawing inferences about federalism issues in their own political and legal systems.

The importance of international law in the Italian legal system can only be appreciated in light of the experience of the Second World War. After the war, Italy, and Germany as well, sought to replace the belligerent approach it had previously adopted toward international relations. Both nations also sought to guarantee that their internal regimes would not again follow the path of totalitarianism. Consequently, the postwar German and Italian Constitutions, among others, adopted international law as part of the national legal system. This adoption has promoted the integration of former aggressor states into a peaceful and democratic international community. However, the constitution makers of postwar Europe could not have anticipated with any precision that this integration would also occur as a result of the growth of a new kind of supranational institution, the European Communities.

Italy adhered to the Treaty creating the European Economic Community (EEC) by ordinary law.<sup>2</sup> This adherence has raised very sensitive constitutional issues relating to the application of Community law because the Italian Constitution does not clearly say that an ordinary law, as opposed to a constitutional amendment, may transfer national sovereignty to an international organization and also because the Constitution does not clearly articulate the legal consequences of such a transfer of sovereignty. For Germany, the existence of the Communities has not raised issues of comparable difficulty because Article 24(1) of the German Grundgesetz (Basic Law or Constitution), unlike the Italian Constitution, specifically permits ordinary legislation to transfer sovereign powers to intergovernmental institutions.

Italian constitutional jurisprudence began the task of determining how to interrelate Community law and national law by attempting to place Community law within the constitutional framework governing the application of international law. The novelty of judicial review of constitutionality in Italy, which began with the first decision of the Constitutional Court in 1956, compounded the difficulty of this task. When that Court first confronted the existence of Community law, the postwar Constitution provided it with two conceptual categories.<sup>3</sup> The Court could consider such law as if it were a treaty, in which case it could be applied by any

<sup>2</sup> Law No. 1203, Oct. 14, 1957, *supp. ord. Gaz. uff.* No. 317, Dec. 23, 1957. For the Treaty Establishing the European Economic Community, Jan. 1, 1958, see 298 UNTS 11.

<sup>3</sup> The case law of the Constitutional Court on international law is limited. With respect to customary international law, it has never had occasion to invalidate a statute as violating the incorporation of customary international law under Article 10 of the Constitution. Customary international law was involved in the following cases: Judgment No. 32 of May 18, 1960, 9

judge but could also be modified by subsequent Italian legislation;<sup>4</sup> or else it could consider such law as if it were customary international law, in which case it would be applicable only through a centralized constitutional review procedure but not modifiable by subsequent ordinary laws.<sup>5</sup>

Neither of these doctrinal options was satisfactory because both impeded what the Community Court of Justice declared in the sixties and seventies to be the proper realization of the supremacy of Community law. The Court of Justice required that Community law have supremacy over ordinary national law and that it be applicable by ordinary courts.<sup>6</sup> In the Italian legal system, considering Community law as treaty law would subject it to the whims of the national legislature, while considering it as customary international law required the additional procedural step of centralized constitutional review. After two decades of wrestling with these doctrinal options, the Constitutional Court in *Granital* has now reached a result compatible with Community law's view of its own supremacy. It has decided to accept the application of Community law as that of an external, autonomous legal system, with the consequences that it is not modifiable by ordinary legislative action and that it is immediately applicable by all judges rather than only through centralized constitutional review.

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Rac. uff. 309, 324 (1960), 1960 Giur. cost. 537, 555-56 (Article 10 of the Constitution does not refer to individual commitments of states, specifically Italy's commitment to protect its German-speaking linguistic minority, but only to customary international law); Judgment No. 67 of Dec. 22, 1961, 12 Rac. uff. 283, 286-88 (1961), 1961 Giur. cost. 1251, 1256-58 (obligation of Italian small boats transporting tobacco outside territorial limits to carry cargo manifests not a violation of customary international law); Judgment No. 135 of July 13, 1963, 18 Rac. uff. 187, 195-96 (1963), 1963 Giur. cost. 1494, 1507-08 (power of Foreign Minister to authorize execution on goods belonging to foreign states that are not related to the exercise of sovereign functions not a violation of customary international law); Judgment No. 48 of Apr. 18, 1967, 25 Rac. uff. 343, 346-49 (1967), 1967 Giur. cost. 299, 306-09 (customary international law does not require the consideration of foreign criminal judgments for double jeopardy purposes); Judgment No. 169 of July 8, 1971, 34 Rac. uff. 471, 478 (1971), 1971 Giur. cost. 1784, 1790 (Article 7 of the Constitution, not Article 10, governs relations between church and state); Judgment No. 96 of June 27, 1973, 38 Rac. uff. 251, 255 (1973), 1973 Giur. cost. 975, 992-93 (customary international law includes principle that state of origin retains jurisdiction over crimes of military personnel committed in allied countries during peacetime); Judgment No. 48 of June 18, 1979, 52 Rac. uff. 275 (1979), 1979 Giur. cost. 373 (diplomatic immunity is a principle of customary international law).

The Constitutional Court's principal cases on the constitutional significance of treaty law are the ones on Community law discussed in this article. One noteworthy case not otherwise mentioned is *Georges*, Judgment No. 54 of June 21, 1979, 52 Rac. uff. 333 (1979), 1979 Giur. cost. 413, in which the Court declared the 1870 text ratifying an extradition treaty with France unconstitutional insofar as it permitted extradition for crimes subject to the death penalty, a penalty that Article 27 of the Italian Constitution bans except under military law. See also *Ugo v. Turkish Airlines*, Judgment No. 132 of May 6, 1985, Gaz. uff. No. 113 bis, May 15, 1985 (Warsaw Convention limitation on liability unconstitutional).

<sup>4</sup> See text at notes 17-20 *infra*.

<sup>5</sup> See text at notes 7-14 *infra*.

<sup>6</sup> *Costa v. ENEL*, Case 6/64, 1964 ECR 585 (supremacy of Community law); *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case 106/77, 1978 ECR 629 (requirement of application by ordinary courts). See Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AJIL 1, 10-16 (1981).

In this article we will first explain how Italy treats customary international law and treaty law. We will then trace the development of the Constitutional Court's jurisprudence on Community law and suggest how the Court's present view of Community law might lead to modifications in the treatment of international law generally.

## I. CUSTOMARY INTERNATIONAL LAW

### *Constitutional Incorporation*

The first of the two preexisting models for treating Community law is that of customary international law. Article 10 of the Italian Constitution provides that the Italian legal order conforms itself to generally recognized rules of international law.<sup>7</sup> The adoption of international law as national law is a familiar concept in European constitutions. In some countries provisions similar to Article 10 have been taken as proof of the acceptance of a kind of monist view of sovereignty, i.e., that by adopting international law, the national legal system subordinates itself to a superior legal order. In Germany and Italy, however, a dualist view prevails. International law and national law are considered as separate systems. Therefore, Article 10 of the Italian Constitution, which speaks of "conforming the national legal order to customary international law," is seen as permanently transforming customary international law into domestic law. By using the word "conforms," Article 10 implies that, as customary international law evolves, the Italian legal order will adopt it continuously and automatically. Of course, as will be discussed shortly, the ordinary<sup>8</sup> judge is not entrusted with discovering changes in customary international law and their effects. That task is reserved exclusively to the Constitutional Court. The incorporation of customary international law is automatic in the sense that, once the Court has spoken, no legislative action is required.

The monist view of the supremacy of international law and the dualist view both allow the supremacy of international law to be established. However, which of the two theories one adopts will influence the response given to two issues: (1) whether other constitutional values may override the applicability of international law, and (2) whether determination of the superiority of international law over national law is reserved to constitutional courts. The effect of Italy's adherence to the dualist theory on the resolution of these issues will be explored in due course.

To return to the text of Article 10, its prescription that Italian law

<sup>7</sup> Article 10, first clause, provides: "L'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute." (Italy's legal system conforms with the generally recognized principles of international law.) The translations of constitutional provisions into English in this article are taken from the loose-leaf service, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (A. Blaustein & G. Flanz eds.). See *id.*, *Italy* (G. Flanz & C. Figliola eds. 1973).

<sup>8</sup> The reference to ordinary Italian courts is to all Italian courts other than the Constitutional Court. The reference to ordinary or "nonconstitutional" courts includes the civil and the administrative courts.

conform itself to customary international law implies that only a constitutional amendment can override the application of such law. This is a departure from the meaning given to similar, but earlier, constitutional provisions in other countries. Article 4 of the Weimar Constitution of 1919 was the first constitutional provision to adopt generally recognized rules of international law as an integral part of national law. Comparable language is found in Article 9 of the Austrian Constitution of 1920 and in Article 7 of the Constitution of the Spanish Republic of 1931. The phrase "generally recognized rules of international law" was interpreted to mean those rules recognized by the country in question. The German view of that era was that if there was a conflicting internal rule, the custom with which the rule conflicted was not recognized by the country.<sup>9</sup> Such a theory has never been accepted in Italy. Article 25 of the present German Constitution is consistent with the Italian view and even goes beyond the text of the Italian Constitution by providing explicitly that international law creates directly applicable rights and duties for individuals.<sup>10</sup> However, the established practice of both countries is that customary international law prevails over later incompatible internal legislation only through a pronouncement of the Constitutional Court.

Although these various national provisions differ in their formulation and scope, their common purpose is to ensure that customary international law, when it is defined sufficiently to be self-executing, is applied by national judges without the need for implementing legislation. These provisions all make the constitution itself, rather than the legislature, the mediator between international and national law. Moreover, if domestic law conflicts with the customary international law applicable to a particular case, these provisions are generally interpreted to make the Constitutional Court the sole judicial authority with the power to establish the superiority of international law. That superiority is established by declaring the conflicting national law unconstitutional.

#### *Constitutional Guarantees of Application*

An ordinary law may conflict with the customary international law incorporated or transformed into the national legal system. If the ordinary law precedes the constitutional incorporation of international law, the subsequently incorporated international law clearly prevails. For ordinary laws enacted after the constitutional incorporation, there are two conceivable possibilities.

<sup>9</sup> Condorelli, *Il Riconoscimento generale delle consuetudini internazionali nella costituzione italiana*, 62 RIVISTA DI DIRITTO INTERNAZIONALE 5, 8-9 (1979); A. LA PERGOLA, COSTITUZIONE E ADATTAMENTO DELL'ORDINAMENTO INTERNO AL DIRITTO INTERNAZIONALE 236 n.6 (1961) (rev. Span. ed. forthcoming in Mexico).

<sup>10</sup> It provides: "The general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory." See *Federal Republic of Germany* (G. Flanz ed. 1974), in CONSTITUTIONS, *supra* note 7.

In the United States and the United Kingdom, a subsequently enacted statute overrides whatever customary international law would otherwise apply under the constitutional law, which for this purpose is based on the principles of common law.<sup>11</sup> In Italy, however, customary international law takes precedence over ordinary statutory law because Article 10 of the Constitution gives the incorporated international law constitutional rank. The Italian solution, which is accepted in other continental countries, is designed to guarantee respect for international law and, indirectly, to diminish the possibility of another war by integrating the state into the international community. Indeed, Article 11 of the Italian Constitution, which is closely connected to Article 10, provides that Italy repudiates war and undertakes to promote international organizations working toward peace and justice.<sup>12</sup> This constitutional status of customary international law has two consequences: first, the requirement of its application can be altered only by constitutional amendment; and second, it may be applied only through the procedure of centralized constitutional review.

Constitutional amendments are a novelty in Italy introduced by the postwar Constitution. In contrast to the previous Italian regime, in which an ordinary law could modify the Constitution, Article 138 of the present Constitution requires passage of the amendment in two separate sittings at least 3 months apart by an absolute majority of Parliament, not just of the members voting. Moreover, after its legislative passage, a popular referendum on the amendment can be required by the petition of 500,000 voters, five regional councils, or a fifth of the members of either house of Parliament. An amendment successfully adopted is referred to as a constitutional law.

The institution of the Constitutional Court is the other constitutional guarantee of the application of customary international law. It guarantees the constitutional adoption of customary international law by subjecting laws to constitutional judicial review. Once a judge presiding over any kind of proceeding whatsoever determines that a constitutional question is not manifestly unfounded and is relevant to the issue under litigation,

<sup>11</sup> For the United Kingdom, see 1 L. OPPENHEIM, *INTERNATIONAL LAW* 39-40 (H. Lauterpacht 8th ed. 1955). For the United States, see *The Paquete Habana*, 175 U.S. 677, 700 (1900) (implying that customary international law applies only in the absence of statute or treaty); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (observing that the Court is bound by the law of nations until Congress passes a contrary act).

<sup>12</sup> Article 11 provides:

L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia tra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo.

[Italy condemns war as an instrument of aggression against the liberties of other peoples and as a means for settling international controversies; it agrees, on conditions of equality with other states, to such limitation of sovereignty as may be necessary for a system calculated to ensure peace and justice between Nations; it promotes and encourages international organizations having such ends in view.]

that judge must certify the question to the Constitutional Court.<sup>13</sup> The underlying litigation remains in suspension until the Court responds to the question of constitutionality.

As the only court in Italy with the competence for constitutional review, the Constitutional Court is quite powerful. It has especially broad powers as regards international law. This is because Article 10 of the Constitution, which conforms Italian law to customary international law, does not say what constitutes customary international law. Clearly, a law conflicting with customary international law indirectly conflicts with the Article 10 principle of conformity. Since only the Constitutional Court has the power to determine judicially that a law is unconstitutional as a result of such an indirect conflict, it also falls to the Court to identify the rules of customary international law. For example, if the subject is not governed by a treaty binding on Italy, a law abridging diplomatic immunities could still be challenged as contradicting customary international law. In this case, the Court would first analyze customary international law to determine its content with respect to diplomatic immunity; then it would determine whether there was a conflict with the challenged internal law. If there were a conflict, the customary international law would prevail, and the national law would be declared unconstitutional.

This is indirect constitutionality. The rules of international law with which ordinary law must conform are not stated in the constitutional text. They are simply referred to as rules that the legislature cannot contradict. Nonetheless, indirect constitutionality falls within the jurisdiction of the Constitutional Court just as much as direct constitutionality, a fact that is consistent with the Court's monopoly over the constitutional review of statutes. Another example of this kind of indirect review of the constitutionality of a law involves delegated legislation. Under Articles 76 and 77 of the Italian Constitution, Parliament may delegate to the Government the power to promulgate laws, or more precisely, acts having the force of law. The delegation must be only for a limited time, according to specified criteria and with a defined purpose. It is established that the Constitutional Court may examine the substance of the legislation eventually promulgated to determine whether it falls within the scope of the delegating act of the legislature.<sup>14</sup>

<sup>13</sup> Art. 1, Constitutional Law No. 1, Feb. 9, 1948, *Gaz. uff.* No. 43, Feb. 20, 1948; Art. 23, Law No. 87, Mar. 11, 1953, *Gaz. uff.* No. 62, Mar. 14, 1953.

<sup>14</sup> *Pascolo v. Commissione straordinaria*, Judgment No. 3 of Jan. 26, 1957, 2 *Rac. uff.* 21 (1957), 1957 *Giur. cost.* 11. This principle was established at the time of the Court's first major ruling on Community law, but in that ruling the Court declined to consider laws that contradicted the EEC treaties as contrary to constitutional law. It distinguished indirect review of the delegation and indirect review of treaty law by asserting that respect for the Constitution's rules on the legislative process was mandatory, whereas adherence to an international organization under Article 11 was voluntary. *Costa v. ENEL*, Judgment No. 14 of Mar. 9, 1964, 19 *Rac. uff.* 131, 159-61 (1964), 1964 *Giur. cost.* 129, 160. As explained below, the Court has now adopted a different view.

The Constitutional Court, as the sole body responsible for identifying customary international law, enjoys broad discretion. Examples of the kinds of questions the Court could conceivably face are the extent of coastal territorial limits and whether foreign nationals are entitled to enjoy the benefits of the welfare state. Although the cooperation of the referring judge is required for such issues to reach the Court, the Court is the final arbiter. The one significant limit on its power is that its jurisdiction is predicated on the enactment of a national law contrary to customary international law.

The uniqueness of the Court's discretion in establishing what constitutes customary international law can be appreciated by considering another area in which constitutional courts may have substantial latitude, namely, the identification of fundamental rights. In some constitutions, provisions incorporate fundamental rights by reference in much the same way that Article 10 incorporates customary international law. The difference is that such constitutions at least refer to specific documents in which the fundamental rights are enumerated. Thus, the Preamble to the French Constitution refers to the 1789 Declaration on the Rights of Man and to the Preamble of the 1946 French Constitution, and the final provisions of the Austrian Constitution refer to various laws affecting individual rights enacted from 1862 to 1919.

#### *Conflicts of International Law with Constitutional Rights*

The Italian practice, mandated by the Constitution, of incorporating international law into national law establishes customary international law as superior to ordinary law in case of conflict. Beyond the conflicts between ordinary national law and customary international law is the conflict of a fundamental constitutional value with customary international law. Had Italy adopted the monist view of the superiority of international law, it might be possible to maintain on first principles that customary international law ought to prevail even over constitutional values. This conclusion would flow from the monist premise that Italy had permanently surrendered a portion of its sovereignty. However, the dualist, not the monist, view prevails in Italy. Because customary international law is considered as external law continuously being incorporated into national law by Article 10 of the national Constitution, the maintenance of other constitutional values can take precedence over the constitutional acceptance of international law values. For Italian jurists, constitutional values clearly ought to prevail over other values, even those of international law. Speaking hypothetically, if a principle as odious as apartheid were somehow to become part of international law and if it were embodied in some form of written national law, it would logically have to be rejected as incompatible with other provisions of the Constitution. However, for several reasons that follow, the Court may not have to pass on such an issue for quite some time.

First, international law is probably largely consistent with constitutional principles. Second, a rule of international law conflicting with constitutional values is unlikely to relate to a national law. Customary international law is not traditionally concerned with the internal structure of the state and the rights of individuals, the principal preoccupations of any national constitution. Moreover, until a written national law not congruent with an international law rule is enacted, the rule cannot be challenged before the Court. The likelihood of simultaneous conflicts between constitutional and international law values and between international law and a national statute is accordingly remote. However, in view of the relatively recent concern of international law with human rights, this factor could change. A final factor diminishing the likelihood of a challenge before the Court is the fluidity of international law. Its lack of accessibility in a statute book makes conflicts with national law harder to find. Even though these factors make it unlikely that the Court will have to rule on a conflict, the theoretical response is important because when treaties, as opposed to customary law, are at issue, the response has practical significance.

The one question presented to the Court involving a potential conflict between customary international law and constitutional rights is whether the diplomatic immunity provided by international law is inconsistent with the constitutional right of equal protection. The Court in a 1979 case dodged the issue.<sup>15</sup> It found that diplomatic immunity was a constitutionally recognized principle of customary international law by virtue of its general incorporation under Article 10. However, it reasoned that any conflict between customary international law and constitutional rights was obviated by the provision under Article 87 of the Constitution that the head of state accredit and receive diplomatic representatives.<sup>16</sup> The Court found that this provision constitutionally established an exception for diplomats to the otherwise general constitutional guarantee of equal protection. Hence, there was no conflict between constitutional and international law values.

## II. TREATIES

### *Treaties as Ordinary Law*

The adoption of treaties in Italy is controlled by the President of the Republic, the Government and the Parliament. Article 87(8) of the Constitution provides that the President may ratify international treaties with, when necessary, the authorization of Parliament. Article 80 specifies that passage of an ordinary law by Parliament authorizing the ratification of a treaty is necessary when the treaty is of a political nature, anticipates submission to arbitrations or judicial proceedings, involves modification of national territory, imposes financial burdens on the state or requires

<sup>15</sup> Denis, Judgment No. 48 of June 18, 1979, 52 Rac. uff. 275 (1979), 1979 Giur. cost. 373.

<sup>16</sup> 52 Rac. uff. at 283, 1979 Giur. cost. at 381-82.



modifications of law. Article 89 provides for governmental control of the President's power of ratification by requiring the President of the Council of Ministers to countersign the act of ratification for it to be valid.

Because ratification of treaties of any significance must be authorized by ordinary law and because Article 10 of the Italian Constitution refers exclusively to customary law, the prevailing view is that these treaties bear the same rank as ordinary national laws.<sup>17</sup> Therefore, if a treaty is self-executing, once it is adopted as national law, it supersedes prior law. The double consequence of according treaties the same rank as ordinary laws is that they are subject to later legislative modification and that ordinary judges, not just the Constitutional Court, may apply them in the face of conflicting prior national laws. The United States Constitution, incidentally, takes the same position on the subsequent legislative modification of treaties. Although Article VII, section 2 provides that treaties, like federal laws, are superior to state laws, even in the U.S. system ordinary federal laws can modify treaties.<sup>18</sup>

In Italy, there have been efforts relying on the international law doctrine of *pacta sunt servanda* to assert the superiority of treaties over national law,<sup>19</sup> but such efforts are unsupported by the Constitution. In fact, the Italian Constituent Assembly clearly favored according treaties the same rank as domestic law.<sup>20</sup>

Notwithstanding those of Italy and the United States, more recent constitutions have provisions that establish the supremacy of treaties over subsequent laws. They are Article 55 of the French Constitution of 1958, Article 28 of the Greek Constitution of 1975 and Article 96 of the Spanish Constitution of 1978. These provisions were adopted because of the shortcomings of unilateral action in dealing with increased international exchange and more complex international problems and because of the consequent growth in the number of treaties.

Although treaties do not enjoy general superiority over national law in the Italian system, for some categories of treaties under the Italian Constitution there is an exception to the principle of equal rank. For these special kinds of treaties, ordinary law must conform to the treaties. The two examples of such treaties relevant for present purposes are the Lateran Pacts and the European Community treaties.

### *The Concordat*

The Concordat, one of the Lateran Pacts,<sup>21</sup> is an agreement between the Italian state and the Holy See. Article 7 of the Constitution implies

<sup>17</sup> A. LA PERGOLA, *supra* note 9, at 296-320.

<sup>18</sup> *Whitney v. Robertson*, 124 U.S. 190 (1888).

<sup>19</sup> See Cassese, *Lo Stato e la comunità internazionale*, in 1 COMMENTARIO ALLA COSTITUZIONE 461, 491-96 (Giuseppe Branca ed. 1975).

<sup>20</sup> Seduta pomeridiana di 24 marzo 1947, 1 CAMERA DEI DEPUTATI, SEGRETARIO GENERALE, LA COSTITUZIONE DELLA REPUBBLICA NEI LAVORI PREPARATORI DELLA ASSEMBLEA COSTITUENTE 605-07 (1970).

<sup>21</sup> Ratified by Law No. 810, May 27, 1929, *Gaz. uff.* No. 130, June 5, 1929.

that the Concordat may be modified only by mutual agreement or by constitutional amendment.<sup>22</sup> The Constitutional Court has not interpreted this grant of special status to the Concordat as exempting its application from respect for basic constitutional principles.

In a 1982 case,<sup>23</sup> the constitutionality of a law implementing the Concordat was challenged. The law provided for the automatic civil effect of the church's annulment of marriages originally performed by a Roman Catholic priest. The Constitutional Court invalidated parts of the law because the church's proceedings for annulments on grounds of nonconsummation did not comport with the Article 24 constitutional guarantees of a fair trial and the right to self-defense. The Court concluded that the declaration of sovereignty under Article 1, together with the recognition of separate spheres for church and state under Article 7, implied that the supreme principles of the constitutional order took priority over the law implementing the Concordat.<sup>24</sup> This case shows that a treaty that ranks higher than an ordinary law can still be subject to the requirement of respecting basic constitutional principles. The Constitutional Court was unwilling unreservedly to accord full faith and credit to the church's judgment. Rather, it reserved the right to review the judgment in the light of constitutional principles.

The original 1929 Concordat has been renegotiated, and the new Concordat is awaiting final ratification.<sup>25</sup> The new Concordat resolves the specific question of annulments of marriages by requiring an Italian judge to give them civil effect only after confirming that the constitutional guarantees of due process have been respected.<sup>26</sup>

The lasting importance of the Court's pronouncement on the Concordat is that it establishes the supremacy of constitutional values over principles established by treaty, even a treaty accorded special status by the Constitution. This case is an actual expression of the supremacy of constitutional values, a supremacy that for customary international law has more theoretical than actual import. In dealing with Community law, the Constitutional Court has come to accept the supremacy of that law over ordinary national law but, as will be shown, has repeatedly insisted on its power to guard national constitutional values.

<sup>22</sup> Article 7 provides: "Lo Stato e la Chiesa sono, ciascuno nel proprio ordine, indipendenti e sovrani. I loro rapporti sono regolati dai Patti Lateranensi. Le modificazioni dei patti accettate dalle due parti non richiedono procedimento di revisione costituzionale." (The State and the Catholic Church are, each within its own ambit, independent and sovereign. Their relations are regulated by the Lateran Pacts. Such amendments to these Pacts as are accepted by both parties do not require any procedure of Constitutional revision.) See *Italy*, *supra* note 7.

<sup>23</sup> Judgment No. 18 of Feb. 2, 1982, 59 Rac. uff. 162 (1982), 1982 Giur. cost. 138.

<sup>24</sup> 59 Rac. uff. at 209-10, 1982 Giur. cost. at 179-80.

<sup>25</sup> For the text, see Law No. 121, Mar. 25, 1985, supp. ord. Gaz. uff. No. 85, Apr. 10, 1985.

<sup>26</sup> Art. 8(2)(b), Concordat of Feb. 18, 1984, *id.*

### III. THE EVOLUTION OF CONSTITUTIONAL DOCTRINES ON COMMUNITY LAW

The relationship of Community law to Italian law is of fundamental importance to furthering Italy's integration into a peaceful community of states, which is the goal underlying the Italian constitutional provisions on international law. For 20 years the Constitutional Court has grappled with the appropriate categorization of Community law. The problem is complex because the Community treaties are clearly more than ordinary treaties, but also less than the charter of a federal state. Their intermediate status makes it difficult to determine how they and the law made pursuant to them should relate to national law.

In the more than 25 years since the adoption of the EEC Treaty, a vast quantity of Community law in the form of directives, regulations and decisions has been produced. A substantial body of Community jurisprudence has simultaneously developed through the Article 177 reference procedure of the EEC Treaty.<sup>27</sup> This procedure requires national courts facing a question concerning the interpretation of EEC law to refer that question to the Community Court of Justice. The jurisprudence of the Community Court has continuously maintained the supremacy of Community law. The Constitutional Court and the Community Court have recently come to agree not only on the supremacy of Community law over ordinary national law, but also on the idea that centralized constitutional review is not a prerequisite to the application of Community law in preference to conflicting national law. However, their reasoning for this result differs, and because of their reliance on different theories of supremacy, future conflicts concerning the superiority of national constitutional values cannot be precluded.

The Constitutional Court first confronted a challenge to the applicability of Community law in Italy in *Costa v. ENEL*, a 1964 case.<sup>28</sup> That case challenged the law establishing ENEL as a national electric monopoly on

<sup>27</sup> Article 177 provides:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Treaty Establishing the European Economic Community, *supra* note 2, 298 UNTS at 76-77.

<sup>28</sup> Judgment No. 14 of Mar. 9, 1964, 19 Rac. uff. 131 (1964), 1964 Giur. cost. 129.

the ground that such a monopoly conflicted with various EEC Treaty provisions. The Court held that Article 11 of the Italian Constitution, authorizing participation in international organizations under general conditions of parity, permitted Italy to join the European Communities without a constitutional amendment. The Court's initial reasoning allowed Italy to limit its sovereignty through adherence to the Community treaties, but it did not allow any exceptions to the principle of equal ranking of treaties and internal laws. That is, a later internal law would take precedence over the treaty and over any rules issued under the treaty prior to the national law. For this reason, the Constitutional Court declined to consider whether the law instituting ENEL conflicted with the EEC Treaty. Under its view of the superiority of later enacted laws, any such conflict was moot because the later national law automatically took priority over any Community law with which it conflicted. The Community Court of Justice in a contemporaneous related case responded by declaring the supremacy of Community law even over subsequent national laws.<sup>29</sup> Since that time, the Constitutional Court's view, which threatened to gravely weaken the lawmaking power of the Communities, has changed.

An intermediate step in accommodating the conflicting position of the Court of Justice came in 1973 with the Constitutional Court's decision in *Frontini v. Ministro delle Finanze*.<sup>30</sup> There, the issue was whether accepting the direct applicability of Community regulations authorizing the Italian fiscal authorities to collect Community import duties violated the constitutional protections concerning the enactment of laws. The Italian Constitution does not explicitly authorize an external body, such as the Community, to create law. If the constitutional limitations on the enactment of laws were violated, it was argued, then the law ratifying the EEC Treaty was unconstitutional insofar as it authorized acceptance of such EEC regulations. According to this argument, the authorization under Article 11 of cession of sovereignty to international organizations would be nugatory.

The Court rejected this argument by finding that the Community law was the law of an autonomous legal order directed toward economic ends. It determined that the delegation of lawmaking power to the Community was consistent with the authorization under Article 11 of the Italian Constitution to transfer sovereignty to international organizations because it found that the Treaty provides sufficient guarantees of due process and because the Italian state participates in the formulation of the Community acts. The Court also declared that it had no power to review the compatibility of individual Community regulations with the Italian Constitution because they were given effect as acts of an autonomous legal system. Thus, an ordinary judge was permitted to apply Community regulations. However, the Court expressly reserved an important role for itself. It declared that if Community acts exceeded their economic purpose

<sup>29</sup> *Costa v. ENEL*, Case 6/64, 1964 ECR 585.

<sup>30</sup> Judgment No. 183 of Dec. 27, 1973, 39 *Rac. uff.* 503 (1973), 1973 *Giur. cost.* 2401.

and conflicted with fundamental principles of the constitutional order or with inalienable rights of the human being,<sup>31</sup> then it could find those acts to have exceeded the scope of the limitation of sovereignty allowed by Article 11. In such a case, the law authorizing the Treaty of Rome would be declared unconstitutional insofar as it permitted those acts. That is, such a declaration would not cause Italy to withdraw from the Community; rather, it would merely have the effect of stopping application of the particular Community act in Italy.

The clarification offered by *Frontini* was that the constitutionality of Community law could be challenged only on the theory that some aspect of the Community treaties pursuant to which it was created violated, or permitted the derivative Community law to violate, fundamental principles of the constitutional order or inalienable rights of the human being. At this point, the Constitutional Court's jurisprudence did establish the superiority of Community law over inconsistent internal legislation, but it did not make clear whether the enforcement of the supremacy of Community law was the exclusive preserve of the Constitutional Court.

In 1975 the Court made clear its view that Italy's accession to the Communities did not confer power on ordinary Italian courts to abstain from applying subsequent Italian law conflicting with Treaty law.<sup>32</sup> However, it did recognize that ordinary judges could invoke the centralized constitutional review proceeding to obtain a declaration of the unconstitutionality of the subsequent ordinary law. In its 1975 decision, the Constitutional Court declared unconstitutional national laws whose content reproduced the content of Community regulations. Such laws deprived ordinary courts of the power to refer questions concerning the interpretation of Community law to the Court of Justice, for what might have been a dispute over the meaning of Community law became a dispute over purely national law. The logic was that since the dispute was over national law, or perhaps more precisely what was ostensibly national law, all the legal issues had to be resolved internally. The unconstitutionality of these laws derived from the blatant interference with the Article 177 referral procedure of the EEC Treaty, which was incorporated as a principle of constitutional rank through Italy's accession to the Communities under Article 11 of the Italian Constitution.<sup>33</sup>

In the 1975 case, the Constitutional Court in effect accorded Community law the status of customary international law. It acknowledged that Community law, like customary international law, was superior to subsequent national law. As in the case of a conflict between customary international law and national law under Article 10, the Court reserved

<sup>31</sup> 39 Rac. uff. at 518-19, 1973 Giur. cost. at 2420.

<sup>32</sup> *Società industrie chimiche Italia Centrale (ICIC) v. Ministero commercio con l'estero*, Judgment No. 232 of Oct. 30, 1975, 45 Rac. uff. 395, 404-05 (1975), 1975 Giur. cost. 2211, 2218. Implicit in the Court's reasoning is recognition that ordinary courts may apply Community regulations without recourse to the constitutional review procedure if there is no conflict with subsequent national law.

<sup>33</sup> 45 Rac. uff. at 405-06, 1975 Giur. cost. at 2219-20.

to itself the power to declare the national law unconstitutional. The difficulty with constitutionalizing Community law in the same way as customary international law was that the delay imposed by a constitutional challenge would pose a real problem because of the quantity of Community law and the frequency of its application.<sup>34</sup> It is ironic that the Court's Article 10 and 11 jurisprudence would impede the full application of Community law because the rationale for Articles 10 and 11 conceives of greater integration as meritorious in two ways. First, greater integration implies a more perfect union of states, a community in which aggression is less likely. Second, it provides added potential for the enforcement of international legal rights. Whenever there has been a common, shared law, judges have provided the impetus toward integration by applying its uniform principles. The voluminous production of Community law and the existence of central lawmaking institutions and the Community Court of Justice have conferred great opportunities on national judges, within the framework of the Communities, to aid the process of further integrating Italy into a democratic community of states.

Moreover, requiring a later statute conflicting with a rule of Community law to be challenged as inconsistent with Article 11 of the Italian Constitution sharply conflicted with the jurisprudence of the Court of Justice of the European Communities. The Court of Justice has consistently maintained that when Italy joined the Community, it irrevocably transferred part of its sovereignty. Therefore, according to the Court's theory, Italy is part of a supranational organization whose law it is bound to apply. In *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*,<sup>35</sup> an Italian judge of first instance asked the Court of Justice whether the Constitutional Court's insistence on centralized constitutional review to establish the priority of Community law over subsequent conflicting national laws was consistent with Community law. The Court of Justice unequivocally said that the requirement of centralized constitutional review was not consistent with Community law.<sup>36</sup> The Court of Justice viewed the Constitutional Court's intermediate position as a procedural bottleneck blocking effective application of Community law. Although the Court of Justice has not quantified its concern about delays, at the beginning of 1984 the Constitutional Court had approximately a 3-year backlog.<sup>37</sup> The Community

<sup>34</sup> Cf. the finding in the Court's 1975 decision that the delay and consequent uncertainty in the law were not determinative. 45 Rac. uff. at 407-08, 1975 Giur. cost. at 2221.

<sup>35</sup> Case 106/77, 1978 ECR 629.

<sup>36</sup> The Court of Justice said:

A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.

*Id.* at 645-46.

<sup>37</sup> *La Giustizia costituzionale nel 1983: Conferenza stampa del presidente Leopoldo Elia*, 1984 Giur. cost. 338, 340.

Court's sensitivity to delays can also be appreciated in light of the parliamentary delays in "receiving" Community directives into national law. This problem became so acute that a law was passed by which the power to receive 97 Community directives issued from 1964 to 1980 was delegated to the Government.<sup>38</sup>

In 1984 in *S.p.A. Granital v. Amministrazione finanziaria*,<sup>39</sup> the Constitutional Court progressed beyond its intermediate stance by accepting a view of supremacy that an American constitutional lawyer might find similar to that embodied in the supremacy clause of Article VI of the United States Constitution. The case involved a conflict between Italian law, which provided that certain import duties were not retroactively applicable, and Community law, which provided that they were. The Court concluded that Community law ought to apply in preference to both prior and subsequent conflicting laws without the need for resort to constitutional review.<sup>40</sup> Consequently, specific questions concerning the applicability of Community law are in principle no longer referable to the Constitutional Court.

The route taken by the Court in applying Article 11 diverges from that by which customary international law is incorporated under Article 10. Under the new Article 11 theory, Community law is not incorporated into the Italian legal system, nor does the Italian system conform itself to Community law. In its 1973 decision recognizing the supremacy of Community law, the Court said: "The law of the Community and the internal law of individual member states can be configured as autonomous and distinct legal systems, although coordinated according to the distribution of powers established and guaranteed by the Treaty."<sup>41</sup> According to this view, Community law is considered the law of an external legal system that supplants ordinary national law. An Italian judge applying Community law is not applying national law, but instead a special kind of non-Italian law. Despite its rhetoric about the autonomy of the Community and national legal systems, the Constitutional Court's 1973 decision did not wholly accept the supremacy of Community law. The 1975 decision accepted the formal supremacy of Community law by treating it like customary international law in the sense of according it supremacy even over subsequent national laws. Nonetheless, on a procedural level, custom-

<sup>38</sup> Law No. 42, Feb. 8, 1982, Gaz. uff. No. 55, Feb. 25, 1982.

<sup>39</sup> Judgment No. 170 of June 8, 1984, 1984 Giur. cost. 1098. In Judgment No. 176 of Oct. 26, 1981, *S.p.A. Comavicola v. Amministrazione delle Finanze dello Stato*, 58 Rac. uff. 501 (1981), 1981 Giur. cost. 1543, the Constitutional Court avoided addressing the Community Court's position in *Simmenthal*. It was asked to accept that Court's *Simmenthal* position or to declare the law ratifying the EEC Treaty unconstitutional insofar as it authorized the supremacy of Community law as proclaimed by *Simmenthal*. The Constitutional Court found the question to be moot because the substantive legal provisions in the underlying litigation had been modified. For a partial translation of the opinion with a Note by Giorgio Gaja, see 19 Common Mkt. L.R. 443 (1982).

<sup>40</sup> 1984 Giur. cost. at 1113-17.

<sup>41</sup> Judgment No. 183, 39 Rac. uff. at 515, 1973 Giur. cost. at 2415.

ary international law treatment meant that centralized constitutional review was required, which the Court of Justice considered an impediment to realizing the supremacy of Community law.

The 1984 decision takes the autonomy language of the 1973 decision and carries it to its logical conclusion. Italy's adherence to the European Communities through Article 11 of the Italian Constitution makes Community law applicable in Italy as the law of an autonomous legal order. This Article 11 acceptance of Community law therefore requires that ordinary courts, that is, courts other than the Constitutional Court, determine whether Community law covers the subject matter dealt with by subsequent internal law. If it does, the Community law takes precedence over the internal law without regard to whether the internal law was adopted before or after the Community law. The internal law is not declared unconstitutional or annulled in any way; rather, it is simply ignored.<sup>42</sup> The dualist rationale behind this result is that Italy has chosen to grant superiority to international law by withdrawing its national law. In this case, there is no need for a constitutional challenge because the conflicting national law in a sense vanishes from the judge's sight. This decentralizing of the process by which courts decide not to apply conflicting national law makes possible the effective and continuous application of Community law without the hindrance of the centralized constitutional review procedure.

Allowing ordinary judges to apply Community law does not mean that the Constitutional Court has lost its role under Article 11 as guarantor of the application of Community law or of constitutional values. As guarantor of the Constitution, the Court has reserved to itself the power to pass on the conformity of Community rules with the fundamental principles of the constitutional order and the inalienable rights of the human being.<sup>43</sup> The Constitutional Court's emphasis on the values of the Italian Constitution may lead to conflicts with the Court of Justice should the latter insist on applying the principle of the supremacy of Community law to questions of human rights. Apart from the present unwillingness of the Constitutional Court to yield on the protection of fundamental constitutional values, the Court of Justice is seriously handicapped in its human rights jurisprudence by the lack of a written Community Bill of Rights.<sup>44</sup> How this potential conflict, if it ever arises, will be resolved cannot now be foreseen.

In *Granital* the Constitutional Court also reserved to itself the power to pass on the constitutionality of laws intended to impede or prejudice the

<sup>42</sup> 1984 Giur. cost. at 1114-15.

<sup>43</sup> 1984 Giur. cost. at 1116. *But see* Gaja, *supra* note 1, at 771. He argues that ordinary courts should take it upon themselves to ignore applicable Italian constitutional law when applying EEC regulations. He asserts that the Constitutional Court's dualistic reasoning implies that no place is left for the Italian Constitution to exert any control over the application of Community law.

<sup>44</sup> See Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 432-36 (1980).



observance of the Treaty when the system itself or its basic principles are involved.<sup>45</sup> Thus, the ordinary judge is empowered to disregard subsequent national laws when they conflict with specific Community rules, but apparently not when they attack the very system of Community law.

Although Italy and the Community now agree on the supremacy of Community law, their theories for this conclusion are different. The Community Court's notion of a permanent cession of sovereignty is a monist theory, whereas the Constitutional Court's theory is a dualist one. The Constitutional Court maintains that Italian law and Community law are two separate legal orders. Italy applies Community law because the Constitutional Court interprets Italian constitutional principles as indicating that the Italian legal order chooses not to impede the application of Community law, not because Italian law is subordinate to Community law as maintained by the Court of Justice. Italy's dualist approach to Community law is shared by the Constitutional Court of Germany.<sup>46</sup> The other member states vary in their approach to Community law.<sup>47</sup>

Recognition of superior law is not new in the history of unions of states, but its interpretation in Europe is.<sup>48</sup> In the United States, the Northern and Southern states both based their theories on a monist premise. They debated the doctrines of the union's sovereignty and states' rights. For both sides sovereignty was indivisible and the only issue was where it resided, a conflict eventually resolved by the Civil War. The conflict in Europe, however, has been far more temperate. In a sense, it is now moot because after the Constitutional Court's recent decision, all of the member states agree on the supremacy of Community law, at least as long as it does not conflict with a fundamental constitutional value. But the Constitutional Court has not accepted the supremacy of Community law by recognizing the supreme sovereignty of the Community. Rather, to use the language of American constitutional lawyers, it has done so by recognizing a kind of division of sovereignty. One is tempted to consider the dualist approach of Italy and Germany as conceived in terms of a Lockean separation of powers.

The reason the Constitutional Court's theory differs from the Community Court's theory is that their purposes in passing on the relationships of national and Community law are different. The Court of Justice is interested in forming a stronger, or perhaps even a federal, union. The Constitutional Court has been concerned to guarantee the enforcement of international law, a measure it understands as a constitutional guarantee of liberty and peaceful coexistence. Traditionally, this guarantee has been

<sup>45</sup> 1984 Giur. cost. at 1116.

<sup>46</sup> See Greifeld, *Requirements of the German Constitution for the Installation of Supranational Authority*, 20 Common Mkt. L.R. 87 (1983).

<sup>47</sup> For a review of member states' positions on the supremacy of Community law, see T. C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 224-46 (1981).

<sup>48</sup> The development of the European Communities is related to the traditional theories of federalism and associations between states by M. FORSYTH, *UNIONS OF STATES: THE THEORY AND PRACTICE OF CONFEDERATION* (1981).

assured by the rigid nature of the Constitution and the procedure for judicial review of laws by the Constitutional Court.

The new approach, in which any Italian judge directly applies Community law, is a radical departure from this system. The guarantee it provides may be as strong as that provided by the traditional system. Factors in favor of the new outlook are that it will eliminate the delay in obtaining a ruling from the Constitutional Court and increase the accessibility of Community law because more judges will directly apply it. Indeed, in this latter respect, the new system bears some resemblance to the American system of diffuse constitutional review. There, any judge may pass on the constitutionality of a law. Uniformity is provided by making the U.S. Supreme Court the ultimate arbiter of constitutionality through an appeal process. In the Community system, the Court of Justice fulfills an analogous function through the channel for interpretation provided by Article 177 of the EEC Treaty. It is the supreme arbiter of Community law, and under the dualist approach now adopted by the Constitutional Court, it has the final word on what a rule of Community law means, and therefore indirectly on whether a rule of Community law displaces national law. There is, of course, no common judiciary in Europe comparable to the federal judiciary in the United States. However, the unifying force of the Court of Justice leads to the same result as regards the supremacy of Community law. Interestingly, the United States also began with only one federal court, the Supreme Court. The Constitution left the establishment of the lower federal courts to the discretion of Congress.<sup>49</sup>

Stepping back from the intriguing question of the future evolution of the European Communities in general and the Community powers of judicial review in particular, some questions remain about the impact of the Constitutional Court's dualist theory for Community law under Article 11. The Court's adoption of this new theory might have an effect on the traditional conformity or transformation theory for customary international law under Article 10. One might also ask whether the special status accorded to Community law under Article 11 ought to be expanded to other categories of treaties. Whether there ought to be an impact on the application of other kinds of international law and what that impact might possibly be are issues that can now be raised in light of the history of the Court's jurisprudence under Articles 10 and 11.

#### IV. *GRANITAL* AS A THRESHOLD OF FURTHER DEVELOPMENT

Extending the approach for Community law to customary international law, which already enjoys constitutional status under Article 10, would mean allowing ordinary judges not to apply national law that conflicts with it. Extending it to treaties would mean elevating all treaties to constitutional rank. They could then only be modified as permitted by their terms, by international law or by renegotiation. It could also mean

<sup>49</sup> U.S. CONST. art. I, §8, cl. 9; art. III, §1.

continuing to make ordinary judges rather than the Constitutional Court responsible for not applying national law that conflicted with a treaty.

Whether it is wise to modify the treatment of international law in these ways is as yet unclear and needs to be tested by experience. The traditional approach to incorporating international law into the national legal system should only be changed if modification would strengthen the guarantee of its application without sacrificing other constitutional values. There are a number of reasons to be concerned that a change might have negative repercussions.

Because nonconstitutional courts would be allowed to look to bodies of law outside the national legal system, breaking with the traditional incorporation theory for the general application of international law might be seen as lessening the constitutional guarantee of centralized judicial review. Without centralized judicial review to assess and test these external bodies of law against the Constitution, ordinary judges would be much freer to accept notions modifying constitutional principles. Of course, this effect could be limited by maintaining the supremacy of fundamental constitutional values through centralized constitutional review. The Constitutional Court has in fact done this for Community law.

At a more fundamental level, permitting diffuse or decentralized review of the compatibility of national laws with international law would tend to infringe on the Italian compromise on the separation of powers whose institutional expression is the Constitutional Court. The ideology of the French Revolution has led Italian legal thought to view government by judges as anathema. This fear is reflected both in the existence of separate civil and administrative courts and in their mutual lack of power to pass on the constitutionality of laws. At the same time, Italy is very much committed to the rule of law. As a result, early in the history of the Italian state the civil courts were given jurisdiction over claims of the violation of personal rights by the state.<sup>50</sup> More recently, the Constitutional Court was instituted to guarantee respect for the Constitution. To overcome the traditional resistance to judicial declarations of law in the common law style, as opposed to the mere judicial application of law, the judges of the Constitutional Court are selected in part by the President of the Republic, in part by Parliament and in part by the judges of the other highest courts.<sup>51</sup> This method of selection differs from the selection of other judges, for which competitive examinations are required,<sup>52</sup> and from the autonomous apolitical control of the judiciary over judicial promotions.<sup>53</sup> Because of the special place accorded international law by the Italian Constitution, shifting the power of judicial review of the conformity of national laws with international law to ordinary courts would modify one of the basic institutional designs of the Constitution.

Another troubling concern is that the processes for creating international

<sup>50</sup> Art. 2, App. E, Law No. 2248, Mar. 20, 1865, *Gaz. uff.*, Apr. 27, 1865.

<sup>51</sup> COST. art. 135 (Italy).

<sup>52</sup> *Id.*, art. 106.

<sup>53</sup> *Id.*, art. 105.

law do not include the same kinds of procedural and substantive safeguards that the Constitutional Court found persuasive in approving decentralized application of Community law. Indeed, in marked contrast to Community law, international law suffers from a general lack of legal infrastructure. In the case of Community law, there are central law-creating institutions and, above all, the Court of Justice. Moreover, the Community treaties provide for procedural safeguards in the formulation of Community law. Through the Article 177 reference procedure, individual litigants have access to the Court of Justice, a definitive, unitary interpreter of Community law. In the case of public international law, there is the International Court of Justice; however, it is accessible only to states and some United Nations organs, not to individuals.<sup>54</sup>

Assuming for the sake of argument that these doubts could be resolved in favor of according all judges the power to apply international law, some constitutional interpretation must be found to justify such a result. Of the several possible approaches, only one will be sketched. It is to reinterpret Article 10 by shifting the focus from the rank of international law to the guarantee of the rights and duties that this law engenders. Although it might be possible for judges to apply some reinterpretations of Article 10 with respect to customary international law, their extension to treaties would require a constitutional amendment.<sup>55</sup>

The Article 10 phrase "Italy's legal system conforms with the generally recognized principles of international law" could be given the meaning that international law takes superiority over conflicting national law without the need for centralized judicial review.<sup>56</sup> Such an interpretation could be justified under either a monist or a dualist view. The dualist view would parallel the application of Article 11 to Community law. International law, like Community law, would be considered the product of an autonomous legal system to whose application the drafters of the Constitution intended to give priority. Ordinary courts would therefore be allowed to ignore conflicting national law in the same way that they

<sup>54</sup> The United Nations, the most universal of international organizations, has not developed into a lawmaking institution with anything approaching the effectiveness of the European Communities. On the difficulties of the United Nations system as a source of law, see Castles, *Legal Status of U.N. Resolutions*, 3 ADELAIDE L. REV. 68 (1967); Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 ASIL PROC. 301 (1979).

<sup>55</sup> Sperduti, *Una Modifica elementare ed essenziale della Costituzione*, 107 Foro italiano V, at 201 (1984), suggests modifying Article 10, first clause, to say "L'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute e assicura, a partire dalla pubblicazione, piena ottemperanza ai trattati internazionali debitamente conclusi." (Italy's legal system conforms with the generally recognized principles of international law and assures, from publication, full compliance with duly concluded international treaties.)

<sup>56</sup> Article 100(2) of the German Constitution contains such a system of direct application of international law rights, although it does provide for a declaratory judgment by the Constitutional Court. It provides: "If, in the course of litigation, doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court." *Federal Republic of Germany*, *supra* note 10.

now do with respect to Community law. The alternative monist view would be to consider Article 10 as directly subordinating the national legal system to customary international law.

The result under either theory for reinterpreting Article 10 is the same. International law would continue to prevail over conflicting national law; but the nullification of rules contrary to international law would be considered to derive from the fiat of the Constitution maker rather than from case-by-case decisions of the Constitutional Court. Ordinary courts, instead of referring the question to the Constitutional Court, would directly determine whether a national law conflicted with international law. They would not ignore conflicting national law; rather, such law would be *a priori* invalid. This reinterpretation, of course, would have to be reconciled with the requirement of Articles 134 and 136 of the Constitution that the Constitutional Court pass on the annulment of laws.

The novel approach suggested here could be compared to what might follow the adoption of a new constitution that differed radically from the one previously in force and involved an actual change of regime. The new constitution could in this case establish implicitly or expressly that certain rules do not apply at all, and that all judges may simply ignore them. Such a view was advanced in Italy with respect to laws adopted during the Fascist period when the constitutional regime was quite different from the present one. However, the Constitutional Court affirmed its jurisdiction to pass on the constitutionality of those laws.<sup>57</sup> Because of this holding, laws enacted under the Fascist regime could not simply be ignored as belonging to a superseded legal order. Rather, they continued in force unless challenged before the Constitutional Court and found contrary to the principles of the present Constitution.

The interpretation of Article 10 discussed here recalls what might have been maintained with respect to the Fascist laws, but there is a difference. The proposed interpretation of Article 10, rather than suggesting that the Constitution requires a certain category of law to be completely ignored, as was argued with respect to the Fascist laws, would require the category of customary international law to be completely accepted and automatically implemented. In this way customary international law would become a kind of fundamental law for Italian courts in somewhat the sense that the common law is for Anglo-American courts.

## V. CONCLUSION

The wisdom of modifying Italy's approach to international law turns on balancing the maintenance of the guarantees now provided by the system of centralized constitutional review against the possibilities for increased integration and more effective application of international law through decentralization. To predict what impact the Constitutional Court's jurisprudence on Community law will have on other international law is not possible. However, it will depend on the historical background

<sup>57</sup> Judgment No. 1 of June 14, 1956, 1 *Rac. uff.* 26, 38 (1956), 1956 *Giur. cost.* 1, 9-10.

and the policy considerations that have been identified. Those considerations will vary according to whether customary international law or treaties are at issue. For treaties, the problems of uncertainty, lack of legal infrastructure, and lack of procedural and substantive safeguards in the formulation of norms, while not insubstantial, are less pronounced than for customary international law. Reference to the approach of other legal systems to international law may also provide some guidance for Italy.

In those legal systems with constitutional courts, the power to review the conformity of international law with basic constitutional principles is usually reserved to them. With respect to treaties, this function is exercised in some systems by permitting the constitutional court to render an advisory opinion on the constitutionality of a treaty before it is ratified. Under Article 54 of the French Constitution, the President, Premier, or President of either house of Parliament can request such a ruling. Under Article 95 of the Spanish Constitution, the Government or either house of Parliament can request the advisory opinion. In both countries, a negative ruling means that the treaty can only be adopted by constitutional amendment. In other countries, as in Italy, the constitutionality of treaties is tested by the usual constitutional review procedures. Rather than render an advisory opinion prior to ratification, the Constitutional Court must wait for a question to be referred to it in the context of an actual controversy. The eventual declaration of unconstitutionality does not apply to the treaty, but to the law that authorizes its ratification or implements it.<sup>58</sup> Instead of causing the treaty to be completely voided, the Court would attempt to confine its holding to a particular interpretation or application of the treaty.

The advantage of the advisory opinion technique over postratification review is that it precludes the embarrassing situation a country would face in reneging on its treaty obligation because part of its ratifying law was invalidated. To avoid this potential embarrassment, the German Constitutional Court has gone to some lengths to adopt the advisory opinion technique.<sup>59</sup> This technique is marred, however, by the difficulty of anticipating all the possible applications of the treaty in order to assess their constitutionality in advance. With regard to Italy and the diffuse versus the present centralized review of the compatibility of international law principles with constitutional principles, it can be argued that centralized review ensures more limited and responsible use of the power to block national performance of international engagements.

The other principal function of constitutional courts is to pass on the conformity of ordinary laws with the principles of international law. With respect to Community law, the Italian Constitutional Court has determined

<sup>58</sup> See, e.g., Judgment No. 98 of Dec. 27, 1965, 22 Rac. uff. 365 (1965), 1965 Giur. cost. 1322 (challenge to constitutionality of law ratifying European Coal and Steel Community on grounds that the Treaty resulted in deprivation of constitutional rights of access to national courts denied on the merits by finding no conflict between the Treaty and constitutional provisions). See also Georges, Judgment No. 54 of June 21, 1979, 52 Rac. uff. 333 (1979), 1979 Giur. cost. 413, discussed in note 3 *supra*.

<sup>59</sup> See Rupp, *Judicial Review of International Agreements: Federal Republic of Germany*, 25 AM. J. COMP. L. 286 (1977).

to defer on this point to the view of the European Court of Justice. That is, it has determined that ordinary judges may pass on the conformity of subsequent ordinary laws with the European Community treaties, though it has reserved the power to control the observance of basic constitutional principles to itself. Again, the law formally subject to judicial review in this case would be a law implementing the treaty or authorizing its ratification.

What impact will the break in *Granital* with the usual scope of activity of a constitutional court have on other kinds of treaties? It can be argued that the same result should apply to some of the other categories of treaties under the Italian Constitution, such as the Concordat, for which the treaty already prevails over subsequent national law. For instance, it might be argued that constitutional review ought not to be required in determining not to apply a subsequent national law that conflicts with the Concordat. It might even be argued that treaties in general should be accorded superiority over subsequent national law and that this superiority should be enforced through decentralized review by ordinary judges rather than by centralized constitutional review.

To speculate on the arguments that may be advanced and the political and judicial response to them is an intriguing enterprise. However, more important than any such speculation is the illustration of how one legal system has managed to accommodate itself to a new kind of international organization without sacrificing the ability to protect its most fundamental principles. The present response of the Italian legal system to international law in general and to Community law in particular deserves attention in other legal systems when they are confronted with the need to apply international law.

International law, however, is not the only area of law to which the experience we have described is relevant. In the sixties, the difference in view between the Constitutional Court and the Court of Justice concerned the supremacy of Community law. In the seventies, the difference became the procedure for assuring the supremacy of Community law. Although in the introduction we promised to leave the drawing of comparative inferences to the reader, we cannot resist indicating some kinds of comparison that ought to come to mind. Article VI of the United States Constitution provides that judges in every state shall be bound by federal law. Although the substantive principle of supremacy is well articulated, the Constitution does not itself say how far federal law may intrude into state procedural law. American jurisprudence on the relations between state and federal procedure and state and federal substantive law is complex, as any scholar of *Erie*<sup>60</sup> and its progeny knows. As one of many possible points for reflection, we offer the story of the Constitutional Court's response to the European Community Court's effort to impose a particular procedural way of treating Community law as suggesting an avenue for resolving tensions between autonomy and integration in both federal and supranational systems.

<sup>60</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1933).

## FEDERALISM AND THE INTERNATIONAL LEGAL ORDER: RECENT DEVELOPMENTS IN AUSTRALIA

*By Andrew Byrnes and Hilary Charlesworth\**

The scope of international law steadily widens. In addition to the traditional concerns of direct relations between states such as warfare and diplomatic immunity, it now includes human rights, labor law and environmental policy, which deal with the relations of a state with its own citizens and territory.

Since this expansion in international law has been largely achieved through the adoption of multilateral conventions, the national operation of treaty obligations has become crucial to the efficacy and force of the modern international legal order. Recent developments in the domestic implementation of obligations assumed internationally are analyzed here for one particular country, Australia.

In Australia, Canada and the United Kingdom, in contrast for example to the United States,<sup>1</sup> there is a strict theoretical separation between the power to enter into treaties and the power to implement them. These three countries have a bicameral Westminster system of government. Members of the executive government (formed by the majority party in the lower, popularly elected House) are members of the legislature, which ensures direct ministerial responsibility. Treaties are concluded by the Executive alone and do not operate internally until they are incorporated as domestic law by legislative enactment.<sup>2</sup> In the United Kingdom, a unitary state, domestic implementation is relatively straightforward. However, in the case of a federation such as Australia, this may be complex.

The constitution of a federal state divides legislative power between the federal and regional governments. Constitutional tradition has assigned the federal government the power to enter into treaties and to legislate on foreign affairs, but regions may hold legislative power over the subject matter of a particular treaty. How, then, can a federal government fulfill its international obligation to implement a treaty without the explicit legislative power to do so? Traditionally, laws governing entry into and performance of treaties did not distinguish between federal and unitary states. Such a distinction would have questioned two fundamentals of the international order: state sovereignty and the equality of states.<sup>3</sup>

\* LLB, Australian National University, LLM, Harvard University; and LLB, University of Melbourne, respectively.

<sup>1</sup> See U.S. CONST. art. VI; see also NETH. CONST. arts. 93 and 94.

<sup>2</sup> *Walker v. Baird*, 1894 A.C. 491; *Attorney-General (Canada) v. Attorney-General (Ontario)*, 1937 A.C. 326; *Polites v. Commonwealth*, 70 C.L.R. 60 (1945); *Chow Hung Ching v. R.*, 77 C.L.R. 449 (1948); *Bradley v. Commonwealth*, 128 C.L.R. 557 (1973).

<sup>3</sup> See, e.g., Vienna Convention on the Law of Treaties, Arts. 27 and 46, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969).



Complete sovereignty and equality of all states at international law were simple assumptions when treaties concerned military alliance, security or territorial agreements. However, the great changes in international law during this century—from the relations between states and the limits of their jurisdiction to more general concerns, national and international—have made the position of the federal state problematic. Matters considered local at federation and assigned to the constituent states may have assumed national or international significance. In his comparative work on the treaty-making power, Wildhaber describes an inherent “federal hesitation” or “federal reluctance” with respect to treaties,<sup>4</sup> and it is often suggested that the demands of federalism and those of the international order are incompatible. “Federalism and a spirited foreign policy go together,” says Wheare, while Sørensen warns that “the federal system of government is particularly ill-adapted to international cooperation.”<sup>5</sup>

Different federations deal variously with the purely constitutional problem. In the United States, at least since *Missouri v. Holland* in 1920, the federal distribution of powers has not restricted entry into treaties.<sup>6</sup> On occasion, however, the Executive has made concessions to the perceived demands of federalism, for example, by proposing “federal” reservations to international instruments to which it wished to become a party.<sup>7</sup>

In contrast, Canada’s federal Government has less power to implement treaties. The Canadian Constitution assigns specified powers to the federal legislature and the provincial legislatures, with all residual powers reserved to the federal Government.<sup>8</sup> The provinces are assigned jurisdiction over “property and civil rights,”<sup>9</sup> which includes labor matters (except those arising in federally regulated industries). When the federal Government

<sup>4</sup> L. WILDHABER, *TREATY-MAKING POWER AND CONSTITUTION* 341 (1971).

<sup>5</sup> K. WHEARE, *FEDERAL GOVERNMENT* 186 (4th ed. 1963); Sørensen, *Federal States and the International Protection of Human Rights*, 46 *AJIL* 195, 218 (1952); see also Looper, *Limitations on the Treaty Power in Federal States*, 34 *N.Y.U.L. REV.* 1045, 1046–47 (1959).

<sup>6</sup> 252 U.S. 416 (1920) (upholding federal legislation implementing a treaty obligation dealing with the protection of migratory birds, a subject over which the federal Government possessed no explicit legislative power).

See generally L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 143–48 (1972).

<sup>7</sup> President Carter, for example, in transmitting four human rights instruments to the Senate in 1978 for its advice and consent, recommended, inter alia, reservations to the International Convention for the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights that would limit the obligation of the United States to the implementation of those provisions “over whose subject matter the Federal Government exercises legislative and judicial administration.” Where the states exercised jurisdiction, the federal Government would simply “take appropriate measures to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment” of these instruments. Letter of Transmittal to the Senate, Feb. 23, 1978, reprinted in *U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES* 83–103 (R. Lillich ed. 1981).

<sup>8</sup> See primarily Constitution Act 1867, secs. 91 and 92 (formerly the British North American Act 1867, name changed by the Constitution Act 1982, itself sched. B to the Canada Act 1982 (UK), ch. 11).

<sup>9</sup> Constitution Act 1867, sec. 92(13).

sought in 1935 to implement three International Labour Organisation Conventions,<sup>10</sup> it relied on power set out in section 132 of the Constitution.<sup>11</sup> Had the federal legislation been held to be valid under the treaty power, it would have preempted any contrary provincial regulation.<sup>12</sup>

In response to a provincial challenge to the legislation, the Privy Council held that the power of implementation did not extend to those treaties Canada had entered into after attaining full international status. It stated, "The consequence of this decision is that the federal government effectively possesses no additional general power of treaty implementation above and beyond the specific powers conferred on it in other sections of the Constitution."<sup>13</sup>

In practice, however, the lack of federal power to implement many treaties has not inhibited Canada internationally to any great extent. Rather, it has led to an extensive consultative process between the federal and provincial governments, which has resulted in Canadian participation in a wide variety of international instruments.<sup>14</sup>

The limits of the power of the Australian federal Government to implement treaties were less determinate.<sup>15</sup> Until recently, the 1936 case of *R. v. Burgess, ex parte Henry*<sup>16</sup> had been the principal locus of discussion in the High Court of Australia. There, federal regulations purporting to implement the provisions of an international airline convention by regulating both inter- and intrastate civil aviation<sup>17</sup> were challenged by the argument that legislative power for intrastate civil aviation belonged to the states. Although some of the challenged legislation was ultimately struck down because it did not conform closely enough to the text of the Convention, federal jurisdiction to enact legislation on matters not otherwise explicitly assigned to it, but which implemented international obligations,

<sup>10</sup> The Conventions were the Hours of Work (Industry) Convention of 1919, the Weekly Rest (Industry) Convention of 1921 and the Minimum Wage-Fixing Machinery Convention of 1928. For the texts of these instruments, see INTERNATIONAL LABOUR OFFICE, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1981 (1982).

<sup>11</sup> Section 132 provides: "The Parliament and Government of Canada shall have all Powers necessary and proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

<sup>12</sup> *Tennant v. Union Bank of Canada*, 1894 A.C. 31.

<sup>13</sup> *Attorney-General (Canada) v. Attorney-General (Ontario)*, 1937 A.C. 326, 353-54.

<sup>14</sup> See generally A. GOTLIEB, CANADIAN TREATY-MAKING 77-83 (1968); and R. St. J. Macdonald, *Conventional International Law and the Domestic Law of Canada*, in JUS ET SOCIETAS: ESSAYS IN TRIBUTE TO WOLFGANG FRIEDMANN 220, 238-40 (G. Wilmer ed. 1979).

<sup>15</sup> The Australian Constitution contains no explicit grant of treaty-making power, but such a power is considered inherent in the prerogatives of the federal Executive, which have devolved from the British Crown. See G. DOEKER, THE TREATY MAKING POWER IN THE COMMONWEALTH OF AUSTRALIA 50-52, 108-13 (1966). Section 51(29) of the Constitution gives the federal Government the power to make laws "with respect to external affairs." In the United States, in contrast, a "foreign relations" power is inferred from the explicit treaty power and the President's power to appoint and receive ambassadors (U.S. CONST. art. II).

<sup>16</sup> 55 C.L.R. 608 (1936).

<sup>17</sup> Air Navigation Regulations, made under the Air Navigation Act 1920 (Cth), §4, which authorized the adoption of regulations to give effect to the Paris Convention for the Regulation of Aerial Navigation of 1919, 11 LNTS 174.

was upheld on the basis of the constitutional grant of federal power to make laws "with respect to . . . external affairs."

Justice Dixon gave the most restrictive, and subsequently influential, interpretation of the external affairs power in *Burgess*.<sup>18</sup> He believed that *intrastate* regulation of civil aviation had an international aspect and thus fell within the external affairs power.<sup>19</sup> Justice Dixon's argument was practical: uniform international regulation enhanced the safety, regularity and efficiency of air navigation generally.

The *Burgess* case was thought to have left open the question whether the federal Government could implement domestically an internationally assumed obligation without any intrinsically external or foreign element. However, in 1982 and 1983, the High Court delivered two decisions upholding such federal power; not only were the effects of the treaties concerned to be entirely domestic, but also the federal Government had no explicit legislative power over their subject matter.<sup>20</sup> These decisions significantly influence the federal-state balance of power in Australia. They also have important implications for Australia's participation in the international community, particularly through the provision under Australian law for the protection of the rights of individuals and minorities as well as of the environment.

Historically, the Australian form of federalism has supported Wildhaber's observation of a "federal reluctance" with respect to international commitments. Effective participation in a variety of international instruments has been limited, or indeed made impossible, because the federal Government accepted that its power to implement them was restricted and that it was obliged to tolerate often haphazard state action in this area.<sup>21</sup> After

<sup>18</sup> Justices Evatt and McTiernan thought the power extended to the implementation of treaties generally and even to the implementation of nonbinding recommendations. 55 C.L.R. at 687. Chief Justice Latham believed that the power included the implementation of treaties generally. *Id.* at 644. Justice Starke took a view similar to that of Justice Dixon. *Id.* at 658. See generally L. R. ZINES, *THE HIGH COURT AND THE CONSTITUTION* 220-30 (1981).

<sup>19</sup> "[A]ir navigation may well be regarded as an entire subject no part of which could be considered as necessarily of no concern to other countries." 55 C.L.R. at 670.

<sup>20</sup> *Koowarta v. Bjelke-Petersen*, 56 Australian Law Journal Reports [Austl. L.J.R.] 625 (1982), 39 Austl. L.R. 417 (1982); *Commonwealth v. Tasmania*, 57 Austl. L.J.R. 450 (1983), 46 Austl. L.R. 625 (1983).

<sup>21</sup> See Bailey, *Australia and the International Labour Conventions*, 54 INT'L LAB. REV. 285, 288-90 (1946); see also Parliamentary Paper No. 197 of 1969, REVIEW OF AUSTRALIAN LAW AND PRACTICE RELATING TO CONVENTIONS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE 7 (1969); G. DOEKER, *supra* note 15, at 109-12, 231; De Stoop, *Australia's Approach to International Treaties on Human Rights*, 5 AUSTL. Y.B. INT'L L. 27 (1970-73). Other examples of deference to the perceived demands of federalism include Australia's reservations to Articles 2 and 50 of the International Covenant on Civil and Political Rights (see Triggs, *Australia's Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?*, 31 INT'L & COMP. L.Q. 278 (1982)), which have recently been removed. See Dep't of the Attorney-General, Press Release, International Covenant on Civil and Political Rights—Removal of Reservations and Declarations, Dec. 10, 1984. Even after the *Koowarta* decision, however, Australia sought the insertion of a federal clause in the United Nations Draft Convention on Torture, UN Doc. E/CN.4/1983/63. The proposal was later withdrawn.

the two decisions discussed here, however, the Australian Government can no longer excuse its inaction in bringing its internal affairs into conformity with the international legal order by lack of legislative power. Together, the cases recognize the increasing interdependence of the internal and the international life of a nation-state.

*KOOWARTA V. BJELKE-PETERSEN*

Australia became a party to the Convention on the Elimination of All Forms of Racial Discrimination of 1966<sup>22</sup> in 1974. It thereby agreed to prohibit and bring to an end racial discrimination by any person, group or organization.<sup>23</sup> This obligation is given some particularity in Article 5, which guarantees citizens equality in enjoyment of specified civil, political, economic, social and cultural rights.

The Australian Government enacted the Racial Discrimination Act in 1975. One of its purposes was to give effect to the 1966 Convention. For example, the Act gave domestic translation to Article 5 of the Convention and made illegal racially discriminatory action that would interfere with certain rights and freedoms, including the rights to own property, to assemble and associate and to be housed.<sup>24</sup> The legislation also prohibited racial discrimination in property transactions.<sup>25</sup>

John Koowarta, an Australian aborigine, relied on this legislation after failure to gain the benefit of a pastoral lease in the State of Queensland. Koowarta and other members of the Winycharam group of aborigines had asked the Aboriginal Land Fund Commission, a federal corporation, to buy the lease of a large property for farming. Under Queensland legislation, the State Minister for Lands had to approve such a transaction. When the commission sought this approval, it was denied because of a governmental policy. In 1972 it had been announced that "[t]he Queensland Government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation."<sup>26</sup> In the same statement, the government had declared that there was sufficient land in Queensland reserved and available for the use and benefit of aborigines.

Koowarta brought an action against the Premier of Queensland and the Minister for Lands under the Racial Discrimination Act, arguing that refusal of permission in accordance with this policy violated sections 9 and 12.<sup>27</sup> Queensland's main defense was that the federal legislation was not

<sup>22</sup> 660 UNTS 195, reprinted in 5 ILM 352 (1966).

<sup>23</sup> *Id.*, Art. 2(d).

<sup>24</sup> Racial Discrimination Act 1975 (Cth), §9, *infra* note 27.

<sup>25</sup> *Id.*, §12, *infra* note 27.

<sup>26</sup> *Koowarta v. Bjelke-Petersen*, 56 Austl. L.J.R. 625, 627 (1982).

<sup>27</sup> Sections 9 and 12 read in pertinent part:

9. (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom. . . .

(2) The reference in sub-section (1) to a human right or fundamental freedom . . . includes a reference to any right of a kind referred to in Article 5 of the [Racial

valid, since the subject of racial discrimination was not constitutionally assigned to the federal Government and therefore fell within the reserved powers of the states.<sup>28</sup> Australia's international commitment to implement the Convention, it was argued, did not affect its internal constitutional scheme.

The federal Government, which intervened in the action when it was removed to the High Court, pointed to two constitutional bases of power to sustain the legislation. One was the federal power to make laws "with respect to . . . the people of any race for whom it is deemed necessary to make special laws";<sup>29</sup> the other was the external affairs power.<sup>30</sup> Five members of the Court considered that, as the Act prohibited discrimination on the basis of race generally without specifying a particular race or races, it could not be said to be a "special law" under section 51(26).<sup>31</sup> Accordingly, the validity of the legislation turned completely on the extent of the external affairs power.

By a vote of four to three, the High Court held that the power extended to allow the implementation of an international agreement even though it dealt with matters otherwise outside federal power. Some members of the majority suggested that the legislation would be valid even in the absence of a treaty because it implemented a norm of customary international law.<sup>32</sup> The main division between the majority and the minority was over the significance of the federal scheme. The majority justices argued that it could not in itself justify the restriction of Australian participation in the international community, while the minority saw the preservation of settled legislative spheres in a federation as crucial to its existence, and ultimately as more important than adherence to international legal norms.<sup>33</sup>

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Discrimination] Convention. [Article 5(d)(v) refers to the right "to own property alone as well as in association with others."]

12. (1) It is unlawful for a person . . .

(a) to refuse or fail to dispose of any estate or interest in land . . . to a second person . . .

by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

<sup>28</sup> Queensland made two other arguments. The first was to deny that Koowarta had standing to bring the action, as the refusal to transfer the lease had been made to the Aboriginal Land Fund Commission and not to Koowarta. It was said that the commission, being a corporation, was incapable of possessing human rights. Only the Chief Justice indicated his sympathy with this argument. *Koowarta*, 56 Austl. L.J.R. at 629-31. The second argument was that Koowarta could not be described as a relative or associate of the commission for the purposes of §12, but this contention was not accepted by any judge.

<sup>29</sup> AUSTL. CONST. sec. 51(26). For further discussion, see text accompanying notes 85-91 *infra*.

<sup>30</sup> AUSTL. CONST. sec. 51(29).

<sup>31</sup> 56 Austl. L.J.R. at 631-32 (Gibbs, C.J.), with whom Justice Aickin concurred; *id.* at 657-58 (Wilson, J.); *id.* at 665 (Brennan, J.). Justice Mason did not consider it necessary to discuss the scope of sec. 51(26), *id.* at 648; while Justice Murphy indicated that the power would support the legislation, *id.* at 656.

<sup>32</sup> *Id.* at 647 (Stephen, J.); *id.* at 653 (Mason, J.); *id.* at 656 (Murphy, J.).

<sup>33</sup> Commentaries on *Koowarta* include: Finnis, *The Power to Enforce Treaties in Australia—the*

The four majority judges all wrote separate opinions (which is traditional in Australia), each with differing emphases on the extent of the external affairs power. All, at least, agreed that there were limits on the exercise of the power to be found in the explicit and implied prohibitions of the Constitution.<sup>34</sup>

The majority justices were less clear about whether entry into a treaty automatically made its subject part of Australia's external affairs and thus gave the federal Government power to implement the treaty, or whether the subject of the treaty had to possess some additional quality of being "indisputably international in character."<sup>35</sup> All members of the majority considered legislation implementing treaty obligations as at least *prima facie* valid under the external affairs power, although each justice gave a different version of this proposition. Justice Murphy, for example, assumed that the implementation of any treaty by legislation would be valid unless constitutional limitations such as those preserving freedom of religion or the separation of powers were violated.<sup>36</sup>

Justice Stephen, another member of the majority, explored what concerns might be sufficiently international for the purposes of the external affairs power. He defined international concern as "the capacity to affect a country's relations with other nations," indicating that there was a class of treaties that did not have this characteristic and thus could not be implemented under the external affairs power. Such treaties were those "neither of especial concern to the relationship between Australia and that other country nor of general international concern."<sup>37</sup>

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*High Court goes Centralist?*, 3 OXFORD J. LEGAL STUD. 126 (1983); Note, 13 FED. L. REV. 360 (1983); Note, 13 MELB. U.L. REV. 635 (1982); Note, 56 AUSTL. L.J. 519 (1982); Crook, *Federalism and the External Affairs Power*, 14 MELB. U.L. REV. 238, 252-56 (1983).

<sup>34</sup> Such as against interference with freedom of interstate commerce, AUSTL. CONST. sec. 92; discrimination against states that impairs the existence or functioning of the states, 56 Austl. L.J.R. at 664 (Stephen, J.); *id.* at 649 (Mason, J.); *id.* at 655-56 (Murphy, J.). The Court was unanimous on this point: *cf. id.* at 634 (Gibbs, C.J.); *id.* at 660 (Wilson, J.).

<sup>35</sup> The phrase is that of Justice Dixon in the *Burgess* case; *see* 55 C.L.R. at 669.

<sup>36</sup> 56 Austl. L.J.R. at 655-56. Compare Justice Mason's more extended formulation:

It is difficult to perceive why a genuine treaty, especially when it is multi-lateral and brought into existence under the auspices of the United Nations or an international agency, does not in itself relate to a matter of international concern and is not in itself an external affair. It is scarcely sensible to say that when Australia and other nations enter into a treaty the subject matter of the treaty is not a matter of international concern—obviously it is a matter of concern to all the parties. . . .

. . . Agreement by nations to take common action in pursuit of a common objective evidences the existence of international concern and gives the subject-matter of the treaty a character which is international.

*Id.* at 651. Justice Brennan took a similar view, describing the search for the quality of being "indisputably international" in the subject matter of a treaty as "a work of supererogation": "The international quality of the subject is established by its effect or likely effect upon Australia's external relations and that effect or likely effect is sufficiently established by the acceptance of a treaty obligation with respect to that subject." *Id.* at 664.

<sup>37</sup> *Id.* at 645. The significance of the possibility of a purely "domestic" treaty and of this

Three members of the majority indicated that treaties which are entered into without truly international motives could not be matters of international concern.<sup>38</sup> This qualification has little practical force, for seldom does a nation sign an international convention with only a single purpose in mind. In the case of Australia's signature and ratification of the Racial Discrimination Convention, for example, the federal Government clearly wanted to state its commitment to eradicating racial discrimination and make more credible its criticisms of other countries' practices. No doubt, it also wished to eradicate racial discrimination within Australia, as only one of its states had passed at that time any antidiscrimination legislation.<sup>39</sup>

The majority justices' flexible notion of external affairs and their insistence that domestic political arrangements accommodate it contrast sharply with the minority's acceptance of the status quo in the domestic realm and relegation of the international area to its periphery. The Chief Justice, and the concurring Justice Aickin, took a quasi-territorial view of internationality. Chief Justice Gibbs argued that the Racial Discrimination Act dealt with matters entirely domestic, because "they render[ed] unlawful an act done within Australia by one Australian to or in relation to another and taking effect only within Australia."<sup>40</sup> Apparently to rationalize previous decisions on the external affairs power, the Chief Justice conceded that international affairs may impinge on entirely domestic conduct but insisted that such instances would be few.<sup>41</sup> The Chief Justice argued that

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extra quality of "internationality" has been overstated by commentators on the *Koowarta* decision. It has been argued, for example, that Justice Stephen's position is, at least in theory, the same as that of the minority (Finnis, *supra* note 33, at 127), or at least quite distinct from that of the majority (M. COPER, *THE FRANKLIN DAM CASE* 6 (1983)). Unless made in bad faith, however, a treaty must have an international aspect. The very notion of a treaty implies agreement, a meeting of national minds, and an intention to create some sort of reciprocal rights and duties between the parties to it. By definition, this must concern the relationship between the parties and the treaty becomes simply an aspect of this international relationship. Thus, Justice Stephen's ostensibly more qualified position on the implementation of treaty obligations reduces in practice to a position similar to that of Justices Mason and Brennan, as is recognized by Justice Brennan in the *Tasmanian Dam* case, 57 Austl. L.J.R. 450, 527 (1983).

<sup>38</sup> Justice Mason described this simply as the requirement that there be a "genuine" treaty. 56 Austl. L.J.R. at 651. Justice Stephen, on the other hand, considered that a treaty which could be said to be a case of "a foreign government lending itself as an accommodation party so as to bring a particular subject-matter within the other party's treaty power" would not fall within the scope of the external affairs power. *Id.* at 645. Justice Brennan suggested a less sinister variation. He disqualified those obligations accepted under a "colourable" attempt to convert a matter of international concern into an external affair. This is where a treaty obligation has been assumed *merely* as a means of conferring legislative power upon the Commonwealth Parliament. *Id.* at 664.

<sup>39</sup> Prohibition of Discrimination Act 1966 (S. Austl.).

<sup>40</sup> 56 Austl. L.J.R. at 632.

<sup>41</sup> *Id.* at 633-34, 638. Justice Wilson's approach was similar, *id.* at 658. The category included the extradition of fugitive offenders to other countries, *McKelvey v. Meagher*, 4 C.L.R. 265 (1906); the prohibition of the publication of material that could create antagonism within Australia against the government of a country with which Australia maintained friendly relations, *R. v. Sharkey*, 79 C.L.R. 121 (1949); the vesting of sovereignty in areas

these cases had in common an operation either "in respect of persons by reason of their connexion with another country" or "with respect to a subject-matter which involved a relationship with other countries."<sup>42</sup>

Although the minority justices were prepared to agree that there had been substantial international interest, debate and even concern over the issue of racial discrimination, they argued that the quality of internationality relevant to the external affairs power lay in the actual content of the legislation.<sup>43</sup> This circumscribed notion of external affairs was the result, argued the minority, of the federal polity. The minority assumed that the very existence of the federation depended upon limiting "external affairs" to subjects already within federal legislative power. It was suggested that federal implementation of an international agreement with respect to working hours, for example, could imperil the federal character of the Constitution.<sup>44</sup> The minority justices pointed to the destructive possibilities of a broad external affairs power: "The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed."<sup>45</sup>

This argument builds windmills, and then tilts at them and distracts attention from the particular freedom Queensland was demanding. Instead of pointing out that the state policy at issue was one that expressly discriminated against aborigines, the minority judgments treated the policy as symbolic of state autonomy and thus were able to neutralize its content. The minority judgments implied that, if freedom by a state to formulate and implement racially discriminatory governmental policies were denied,

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outside Australia, *New South Wales v. Commonwealth* (Seas and Submerged Lands case), 135 C.L.R. 337 (1975); the deportation of aliens, *Robtelmes v. Brennan*, 4 C.L.R. 395 (1906); and the implementation of treaties of peace, *Roche v. Kronheimer*, 29 C.L.R. 329 (1921); *Jolley v. Mainka*, 49 C.L.R. 242 (1933). The less obviously international *Burgess* case, 55 C.L.R. 608 (1936), was explained as affecting the relations between Australia and other nations "in some direct way"; intrastate practice has an effect on interstate and overseas air navigation since all aircraft use the same facilities and must obey the same rules.

<sup>42</sup> *Koowarta*, 56 Austl. L.J.R. at 634.

<sup>43</sup> "[T]he test must be whether the provisions given effect have themselves the character of an external affair, for some reason other than that the executive has entered into an undertaking with some other country with regard to them," stated the Chief Justice. *Id.* at 638. Justice Wilson employed the same term as the majority ("international character") to describe the quality a law must have in order to pass constitutional muster. However, he argued that the presence of this characteristic is determined by an examination only of the operation of the legislation and not the reasons for its enactment. *Id.* at 658-59.

<sup>44</sup> *Id.* at 638.

<sup>45</sup> *Id.* at 637. Justice Wilson made a similar prediction:

[W]hat is emerging is a sophisticated network of international arrangements directed to the personal, economic, social and cultural development of all human beings. The effect of investing the Parliament with power through [the external affairs power] in all these areas would be to transfer to the Commonwealth virtually unlimited power in almost every conceivable aspect of life in Australia. . . .

*Id.* at 660-61.



no other area of state power would be free from federal encroachment. Legislation prohibiting such state action was discussed as the tip of an objectionable iceberg, and not as an attempt to ensure observation of fundamental human rights.<sup>46</sup>

Justice Wilson agreed with the majority that "[t]here is now no limit to the range of matters which may assume an international character, and this situation is unlikely to change."<sup>47</sup> The majority justices saw this as inevitably expanding the scope of the external affairs power, but Justice Wilson suggested the opposite—the importance of protecting state legislative powers. Maximum state autonomy becomes an end in itself.<sup>48</sup>

What was in fact claimed in *Koowarta*, under the rubric of state

<sup>46</sup> This approach is plain in the judgment of Justice Wilson. Although he conceded that "of all Australia's international obligations there must be few, if any, of greater humanitarian importance than the obligation to strive for racial equality," he went on:

[T]he outstanding importance of this particular obligation must not blind us to the wide-ranging implications of the next step in the Commonwealth's argument. . . . that the existence of this obligation necessarily brings into existence an external affair. . . . [I]f this argument holds good for an obligation such as the elimination of racial discrimination, it must likewise hold good for all the other important obligations which arise out of Australia's international relations. . . . Both economically and socially the earth is now likened to a global village where the international community concerns itself increasingly with matters which formerly were regarded as only of domestic concern.

*Id.* at 659.

<sup>47</sup> *Id.*

<sup>48</sup> Justice Wilson referred in this context to the majority opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1975). *Koowarta*, 56 Austl. L.J.R. at 661. In *Usery* federal legislation extending fair labor standards to employees of U.S. states and their subdivisions was held unconstitutional on the ground that it would "impermissibly interfere with the integral governmental functions of these bodies." 426 U.S. at 851. The reference to *Usery* is an ambiguous one, but in any event its implications are untenable. Justice Wilson may have intended to mean that the ability of a state to decide for itself how minority racial groups should be treated is essential to its continued existence and ability to function effectively in the federal system. The equal protection clause of the Fourteenth Amendment would of course preclude such an extension of *Usery* in the United States. *Oregon v. Mitchell*, 400 U.S. 112 (1970), which Justice Wilson also invokes to support his denial of federal power, makes precisely this point: while a federal law could not establish age qualifications for voters for state offices because this is an essential state function, *id.* at 125 (a proposition that was in any event later expressly invalidated by the Twenty-sixth Amendment to the Constitution), it could ban literacy tests as qualifications for voting in state elections because "there was a long history of the discriminatory use of literacy tests to disenfranchise voters on account of their race," *id.* at 132. Moreover, subsequently the Supreme Court has considerably undermined, and recently repudiated, the *Usery* notion relied upon by Wilson, *J. See Garcia v. San Antonio Metropolitan Transit Auth.*, 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985); *E.E.D.C. v. Wyoming*, 103 S.Ct. 1054 (1983); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). On the other hand, Justice Wilson may have been concerned in particular about the potential of the external affairs power as a basis for limitless federal legislation and may have sought to maintain fixed areas of power. This position is tantamount to an affirmation of the long since rejected "reserved powers" doctrine. *See Amalgamated Soc'y of Engineers v. Adelaide S.S. Co. Ltd.*, 28 C.L.R. 129 (1920). In any event, Wilson, *J.* does not refer to the most relevant U.S. case on this issue, *Missouri v. Holland*, 352 U.S. 416 (1920), which would support the majority's view.

autonomy, was the right of a state to adopt racially discriminatory policies. Racial discrimination is morally abhorrent because of its categorization of persons according to immutable characteristics without regard to individual identity or merit; officially sanctioned acts of racial discrimination institutionalize already established patterns of oppression. That nondiscrimination on racial grounds is accepted as a rule of *jus cogens*, a norm from which no derogation is permitted at international law,<sup>49</sup> indicates both its importance as a human right and the harshness of Queensland's policy. The Racial Discrimination Convention provides for limited exceptions to the norm of nondiscrimination—distinctions may be made between citizens and noncitizens, and for the purposes of affirmative action measures for disadvantaged groups<sup>50</sup>—but Queensland's action does not fall within them.

The *Koowarta* minority justified support for state autonomy in this context by describing the Queensland policy in a comparatively neutral way. In an apparent adaptation of the terms of Resolution 1503 of the United Nations Economic and Social Council,<sup>51</sup> the Chief Justice contrasted violations of human rights that threaten international peace and security, gross violations of human rights or patterns of violations such as genocide or "whole-sale deprivations" of civil or economic rights (which he argued were the only types of human rights violations prohibited at international law), with what he termed "trivial" acts of racial discrimination.<sup>52</sup> He referred to the Queensland government's policy as standing "on an entirely different plane" from other types of human rights violations.<sup>53</sup> This assumes that the governmental policy was an isolated act by an otherwise nondiscriminatory government and that, short of the imposition of a systematic apartheid regime, the Australian states may treat minority racial groups as they please. While it is clear that Queensland's policy would not in itself be admissible for consideration by the United Nations under the procedures established under Resolution 1503, it nonetheless is illegal at international law. Article 1 of the Racial Discrimination Convention draws no distinction between "trivial" and "whole-sale" acts of discrimination: it refers to "any . . . restriction . . . based on race . . . which has the purpose or effect of . . . impairing the . . . exercise, on an equal footing, of human rights and fundamental freedoms." Article 5(d)(v) guarantees equality in the right "to own property alone as well as in association with others."

<sup>49</sup> See I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 513, 596 (3d ed. 1979).

<sup>50</sup> Convention, *supra* note 22, Art. 1(2), (3) and (4).

<sup>51</sup> Procedures for Dealing with Communications relating to Violations of Human Rights and Fundamental Freedoms, ESC Res. 1503 (XLVIII), 48 UN ESCOR Supp. (No. 1A) at 8, UN Doc. E/4832/Add.1 (1970). The resolution authorizes a working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider and refer to the Sub-Commission communications that "appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms."

<sup>52</sup> *Koowarta*, 56 Austl. L.J.R. at 640.

<sup>53</sup> "It could not in my opinion be said that the refusal of the Minister to grant his consent was a gross violation of a human right or fundamental freedom." *Id.*

The minority judgments recognized that their approach would lead to a less active role for Australia in international affairs. Although the federal Government would be able to assume whatever international obligations it chose, it would be unable to guarantee their performance whenever legislation was required on a subject on which it had no explicit constitutional power. The answer to this problem, argued the minority justices, lay in obtaining state cooperation in the implementation of international obligations. While Justice Mason dismissed this possibility as "unrealistic . . . in the light of our knowledge and experience of Commonwealth-State co-operation and of co-operation between the States,"<sup>54</sup> Justice Wilson described it as simply a "political challenge."<sup>55</sup> He chose an unfortunate example of such a joint endeavor: the attachment of reservations to Australia's instrument of ratification of the International Covenant on Civil and Political Rights in 1980. The extensive, and often inconsistent, reservations, formulated in a series of negotiations between the federal and state governments, have been trenchantly criticized and described as achieving the repudiation of the Covenant rather than its ratification.<sup>56</sup> All but two were withdrawn in December 1984.<sup>57</sup>

#### COMMONWEALTH V. TASMANIA

Less than a year after the *Koowarta* decision, another state challenged federal legislation based on the external affairs power.<sup>58</sup> The case arose out of a major political dispute between the Commonwealth and Tasmanian governments over the construction of a dam and hydroelectric power station on the Gordon River below its junction with the Franklin River in southwestern Tasmania. In 1982 the area had been placed on the World Heritage List maintained pursuant to the provisions of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 1972,<sup>59</sup> to which Australia was a party. The Tasmanian government wished to proceed with the scheme, which could generate large amounts of electricity at low cost and which it considered essential to achieve economic growth and to create employment opportunities in an ailing economy. In March 1983, a federal Labor Government came to power. It was determined to prevent construction of the dam because it would

<sup>54</sup> *Id.* at 650.

<sup>55</sup> *Id.* at 660.

<sup>56</sup> Triggs, *supra* note 21.

<sup>57</sup> Press Release, *supra* note 21.

<sup>58</sup> *Commonwealth v. Tasmania*, 57 Austl. L.J.R. 450 (1983), 46 Austl. L.R. 625 (1983). The case has been discussed by the following: M. COPER, *supra* note 37, at 1-26; Connolly, *The Tasmanian Dam Case: Treaties and the Australian Constitution*, AUSTL. FOREIGN AFF. REC., July 1983, at 756-58; Lane, *The Federal Parliament's External Affairs Power: The Tasmanian Dam Case*, 57 AUSTL. L.J. 554 (1983); Howard, *External Affairs Power of the Commonwealth*, CURRENT AFF. BULL., September 1983, at 16; Walker, *A legal wilderness preserved*, LAW INST. J., July 1983, at 307; Crock, *supra* note 33, at 256-63; Connell, *External affairs power and the domestic implementation of treaties*, AUSTL. FOREIGN AFF. REC., September 1983, at 492.

<sup>59</sup> 27 UST 37, TIAS No. 8226, 1037 UNTS 151, reprinted in 11 ILM 1358 (1972) (minus Arts. 34-38). Australia ratified the Convention on Aug. 22, 1974; the Convention entered into force on Dec. 17, 1975.

flood significant aboriginal archaeological sites and damage a remarkable wilderness.

Before the new Parliament sat, the federal Government made regulations under the National Parks and Wildlife Act 1975 and subsequently enacted the World Heritage Properties Conservation Act 1983, under which regulations were also issued. The legislation stopped construction of the dam by prohibiting a wide range of activities within certain areas: the dam site, the Franklin River valley and areas containing various archaeological sites.

As the Commonwealth had no specific legislative power over the environment or the preservation of the national or world cultural heritage within its territory, it sought to justify the legislation by reference, *inter alia*, to the federal powers discussed in *Koowarta*: first, the "external affairs" power (arguing that relevant sections of the Act and regulations gave effect to the World Heritage Convention), and second, the power to legislate for people of any race for whom the Parliament deemed it necessary to make special laws (arguing that the protection of aboriginal archaeological sites was such a law).

The High Court was divided severally on the validity of particular sections of the Act and regulations, but sufficient legislation survived scrutiny to prevent the Tasmanian Hydro-Electric Commission from proceeding with the construction of the dam.

A majority of the Court<sup>60</sup> held that, subject to overriding constitutional prohibitions, the external affairs power extended to the implementation of treaty obligations, whatever their subject, and that it was unnecessary to identify in them any further characteristic of "internationality." Paragraph 9(1)(h) of the World Heritage Act and the World Heritage Regulations<sup>61</sup> were held valid under the external affairs power because they were a reasonable and appropriate way of fulfilling Australia's obligation under the Convention to take appropriate steps to identify and preserve items of the world heritage within Australian territory.<sup>62</sup>

The divergence between the High Court's majority and minority rested on their reading of the decision in *Koowarta*, and their construction of the

<sup>60</sup> The composition of the Court had changed since the decision in *Koowarta*. Justice Aickin had died and was replaced by Justice Dawson who, as Solicitor-General for the State of Victoria, had argued that state's case (as intervenor) for the invalidity of the Racial Discrimination Act in *Koowarta*. Justice Stephen had resigned from the Court and had been replaced by Justice Deane.

<sup>61</sup> The effect of paragraph 9(1)(h) of the World Heritage Properties Conservation Act 1983 and the World Heritage (Western Tasmanian Wilderness) Regulations was to make unlawful the carrying out of works involving or associated with the construction of a dam in the area that formed part of the world heritage without the consent of the responsible federal Minister.

<sup>62</sup> A majority of the Court also held that the race power supported legislation based on it, although, as formulated, the provisions were invalid. See text accompanying notes 85-90 *infra*. Certain provisions relying on the federal corporations power (AUSTL. CONST. sec. 51(20)) were upheld, while a majority held that the provisions based on an implied power of nationhood were invalid. See generally M. COPER, *supra* note 37, at 11-18.

Convention. The majority judgments take an internationalist view of Australia's role in the world by rejecting a fragmented power to implement treaties. The demands of the international order are preferred to those of state autonomy: the only guarantees of federalism provided are the states' continued existence and capacity to function and freedom from discriminatory federal legislation.

The focus of the minority is more parochial. As in the *Koowarta* dissents, its implicit premise was that the claims of the states to autonomy were superior to those of a national government or the international community. *Koowarta*, however, had ruled out the possibility of employing the "domestic-international matters" distinction to limit the external affairs power.

The minority in the *Tasmanian Dam* case proposed instead that the subject of the international obligation must be "of international concern" to be implemented domestically by the federal Government. *Koowarta* had acknowledged that matters once of only domestic concern could become objects of international concern and the *Dam* minority sought to establish a high threshold for this change in character.

A matter of international concern, the minority argued, was quite distinct from a matter "fit for international action"<sup>63</sup> or a "mere . . . interest or concern among nations which finds expression in a Convention."<sup>64</sup> It was one on which the action or inaction of a country would "significantly" affect or "threaten serious disruption to" its relations with other nations.<sup>65</sup> Racial discrimination was such a matter; environmental protection was not.<sup>66</sup> Although the Chief Justice discerned a "clear contrast" between the two concerns, the nature of the distinction was not made clear. It may be that the former is prohibited also by customary international law; or that the obligation to implement the Racial Discrimination Convention was cast in more peremptory language than that of the World Heritage Convention.<sup>67</sup> Justice Wilson indicated that the number and significance of the parties to a treaty are relevant in determining if its subject is of international concern.<sup>68</sup> The minority saw its

<sup>63</sup> 57 Austl. L.J.R. at 476 (Gibbs, C.J.). <sup>64</sup> *Id.* at 517-18 (Wilson, J.).

<sup>65</sup> *Id.* at 476 (Gibbs, C.J.); *id.* at 518 (Wilson, J.); *id.* at 567 (Dawson, J.).

<sup>66</sup> See, e.g., the remarks of Chief Justice Gibbs:

The protection of the environment and the cultural heritage has been of increasing interest in recent times, but it cannot be said to have become such a burning international issue that a failure by one nation to take protective measures is likely adversely to affect its relations with other nations, unless of course damage or pollution extends beyond the borders. If one nation allows its own natural heritage (and no other) to be damaged, it is not in the least probable that other nations will act similarly in reprisal, or that the peace and security of the world will be disturbed—in this respect, damage to the heritage stands in clear contrast to such practices as racial discrimination. . . .

*Id.* at 476.

<sup>67</sup> *Id.*

<sup>68</sup>

When it is said that the subject matter of the Convention is a matter of international concern it may be relevant in judging the strength of that concern to observe that to date seventy-four nations have become parties to it; that is to say, a little less than half

task as "determin[ing] the importance of the particular obligation in terms of international relationships,"<sup>69</sup> while the majority argued that this was the role of the Executive.<sup>70</sup>

The minority justices designated the issue of racial discrimination as the paradigm of the transition from domestic to international concern and measured environmental protection unfavorably against it. This standard distorts the investigation because the prohibition against racial discrimination is the strongest possible case of general international consensus. The norm of nondiscrimination on racial grounds, as noted above, is one of the few principles of international law generally accepted as *jus cogens*. There are many other issues of international concern that do not enjoy this status.

The majority and minority disagreed in their textual interpretations of the Convention: Did it impose any obligations on Australia and, if so, did its federal clause limit the scope of that obligation?

The two members of the minority who considered the former question held that Articles 4 and 5<sup>71</sup> of the Convention imposed no obligations on

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the total membership of the United Nations. Furthermore, there are some notable absentees from the list of parties, including the United Kingdom, the Soviet Union, China, Belgium, Holland, Norway, Sweden, Japan, New Zealand, Singapore, Malaysia, Thailand and the Philippines. . . . [T]he extent and intensity of international concern that is reflected in the present Convention is in no way comparable to that which was evidenced by the Convention on the Elimination of Racial Discrimination. . . .

*Id.* at 516. Compare the remarks of Judge Lachs in his dissenting opinion in the North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 226 (Judgment of Feb. 20):

Delay in the ratification of and accession to multilateral treaties is a well-known phenomenon in contemporary treaty practice. . . . [E]xperience indicates that in most cases [it is] caused by factors extraneous to the substance and objective of the instrument in question. . . .

. . . [This] indicates that the number of ratifications and accessions cannot, in itself, be considered conclusive with regard to the general acceptance of a given instrument.

<sup>69</sup> 57 Austl. L.J.R. at 518 (Wilson, J.).

<sup>70</sup> *Id.* at 692 (Mason, J.); *id.* at 771 (Brennan, J.).

<sup>71</sup> These articles of the Convention, *supra* note 59, read, in pertinent part:

#### Article 4

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

#### Article 5

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification . . . of this heritage. . . .

a party and thus were not evidence of international concern. Their conclusion was based on a variety of factors: a comparison of the words used in Articles 4 and 5 with those used in other articles of the Convention<sup>72</sup> and with language used in the Racial Discrimination Convention,<sup>73</sup> the changes in language that had taken place during the drafting of the Convention,<sup>74</sup> the self-defining nature of the "duties" imposed<sup>75</sup> and the general respect for national sovereignty they saw contained in the Convention.<sup>76</sup>

The majority argued that methods of construction appropriate to domestic statutes and contracts were unsuitable when dealing with international agreements.<sup>77</sup> The obligation imposed by the Convention was to take appropriate steps to identify and preserve the world heritage. Although the details of performance would be decided by the state concerned, each party was obliged to consider in good faith what the appropriate steps for it to undertake were; the question whether this obligation had been fulfilled was a justiciable one.<sup>78</sup> That UNESCO had adopted a resolution containing nonobligatory recommendations for protecting the cultural and natural heritage of nations not forming part of the world heritage<sup>79</sup> at the same time as it had adopted the Convention supported the argument that the provisions of the Convention were intended to impose obligations.<sup>80</sup>

The interpretation of Article 34 of the Convention, the federal clause, also produced division in the Court.<sup>81</sup> Once the majority justices decided

<sup>72</sup> 57 Austl. L.J.R. at 469 (Gibbs, C.J.); *id.* at 515 (Wilson, J.): Articles 6(2), 6(3), 16(1) and 27(2) use the word "undertake"; Articles 17, 18 and 29(1) provide that the parties "shall" do certain things. However, the obligations imposed by these articles do not seem significantly less vague or self-defining than the "duty" imposed by Article 4 and the "endeavour" required of a party by Article 5.

<sup>73</sup> *Id.* at 515 (Wilson, J.). Both Chief Justice Gibbs and Justice Wilson also considered that the absence of a complaints procedure similar to that in the Racial Discrimination Convention, *supra* note 22 (see Arts. 11-14), indicated the absence of an obligation. *Id.* at 470, 516. This argument does not take into account the supervisory role of the World Heritage Committee with respect to the World Heritage Convention.

<sup>74</sup> *Id.* at 472-73 (Gibbs, C.J.); *id.* at 515 (Wilson, J.). See generally Goy, *The International Protection of the Cultural and Natural Heritage*, 4 NETH. Y.B. INT'L L. 117, 135-36 (1973); Meyer, *Travaux Préparatoires for the UNESCO World Heritage Convention*, 2 EARTH L.J. 45, 49-50 (1976).

<sup>75</sup> 57 Austl. L.J.R. at 470-72 (Gibbs, C.J.).

<sup>76</sup> As evidenced, *inter alia*, by references to respect for the sovereignty of parties in Articles 5, 6(1), 11 and 34, as well as references to the protection of property rights. *Id.* at 470 (Gibbs, C.J.); *id.* at 514-15 (Wilson, J.); *id.* at 567 (Dawson, J.).

<sup>77</sup> "[I]t would be contrary to both the theory and practice of international law to . . . deny the existence of international obligations unless they be defined with the degree of precision necessary to establish a legally enforceable agreement under the common law." *Id.* at 546 (Deane, J.). See also *id.* at 509 (Murphy, J.); *id.* at 530-31 (Brennan, J.).

<sup>78</sup> *Id.* at 489-90 (Mason, J.); *id.* at 509 (Murphy, J.); *id.* at 530-31 (Brennan, J.); *id.* at 546 (Deane, J.).

<sup>79</sup> UNESCO Doc. 17 C/107 (Nov. 15, 1972), reprinted in 11 ILM 1367 (1972).

<sup>80</sup> 57 Austl. L.J.R. at 490 (Mason, J.); *id.* at 531 (Brennan, J.). *Contra*, *id.* at 473 (Gibbs, C.J.); *id.* at 525 (Wilson, J.); *id.* at 566 (Dawson, J.).

<sup>81</sup> Article 34 of the Convention, *supra* note 59, reads:

The following provisions shall apply to those States Parties to this Convention which have a federal or non-unitary constitutional system:

that the federal Government had legislative power, although concurrent with state power, to implement Articles 4 and 5 of the Convention, they concluded that Article 34(b) had no application.<sup>82</sup> This interpretation of Article 34 is clearly correct. The argument that the existence of concurrent federal-state legislative jurisdiction over the subject of a treaty indicates that its implementation rests with the state (and that Article 34(b) applies) runs counter to the *raison d'être* of this particular clause<sup>83</sup> and of federal clauses generally. Federal clauses are a concession to federal states, an exception to the principle of equality of obligation in multilateral treaties. Accordingly, such clauses should not be broadly construed.

Justice Dawson, a member of the *Tasmanian Dam* minority, construed the federal clause in a different way. He argued that Article 34(b) was applicable and that the federal Government's only duty under the Convention was to inform state authorities of its relevant provisions and recommend their adoption. Justice Dawson thought legal jurisdiction lay with the Tasmanian government because it was best placed to decide on measures of implementation. The fulfillment of the obligations imposed by the Convention, he asserted, required a "balancing of environmental, social and economic considerations" that were not within federal power, for the critical issue in this process was the energy needs of Tasmania.<sup>84</sup> The terms of Articles 4 and 5 of the Convention, however, indicate that its central obligation is the effective preservation of a cultural and natural heritage that has universal value, a judgment which a national government is in a particularly good position to make.

It will be recalled that the federal Government argued unsuccessfully in *Koowarta* that the Racial Discrimination Act of 1975 was a special law within the meaning of section 51(26) of the Australian Constitution, which gave the federal Government the power to make laws "with respect to . . . the people of any race for whom it is deemed necessary to make

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(a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal States;

(b) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, counties, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, counties, provinces or cantons of the said provisions, with its recommendation for their adoption.

<sup>82</sup> *Id.* at 491 (Mason, J.); *id.* at 509 (Murphy, J.); *id.* at 531 (Brennan, J.); *id.* at 546-47 (Deane, J.).

<sup>83</sup> The *travaux préparatoires* show that Austria had proposed the insertion of the clause. Austria stated that it would be unable to ratify the Convention if no reservations were permitted, owing to its constitutional distribution of powers by which its regions, the *Länder*, possessed exclusive legislative power over conservation of nature, building and land use planning. UNESCO Doc. SHC/MD/18/Annex I, at 2, and Annex II, para. 7 (1972). The result was the insertion of Article 34. UNESCO Doc. 17 C/18/Annex, para. 56 (1972).

<sup>84</sup> 57 Austl. L.J.R. at 568-69. Justice Wilson saw the clause as confirming that the Convention sought to achieve its purposes "by a conciliatory and informal engagement of international relationships" falling short of creating any obligations on the federal Government. *Id.* at 516. Chief Justice Gibbs did not express a definite view on the issue. *Id.* at 472.



special laws." Five of the six members of the Court who considered the issue agreed that a general prohibition on racial discrimination could not be such a law—it was necessary for a particular race or races to be specified.<sup>85</sup> This result was due mainly to the form of the legislation. If the Act had applied only to aborigines and Torres Strait islanders, it would have been valid. Separate, identical statutes relating to other specific racial groups would also have been valid.<sup>86</sup>

As the sections of the Racial Discrimination Act challenged in *Koowarta* were upheld under the external affairs power, the outcome of the case did not turn on the interpretation of section 51(26). In the *Dam* case, however, the constitutional basis of certain provisions of the World Heritage Properties Conservation Act 1983 was the race power alone. These sections provided that, upon proclamation by the Governor-General, it would be illegal to carry out construction works, to remove artifacts or to damage a site that formed part of the world cultural or natural heritage and was also "of particular significance to the people of the Aboriginal race."<sup>87</sup>

The *Dam* case minority considered these provisions a general, not a "special," law and thus without constitutional foundation. First, the legislation "confer[s] no rights and impose[s] no duties on members of the Aboriginal race as such, or on other persons in relation to their dealings with members of the Aboriginal race."<sup>88</sup> Second, as the aboriginal sites protected under the Act were required to have outstanding universal significance, the law could not be characterized as a special one for aborigines.<sup>89</sup> This reasoning depends on the curious argument that, because the legislation did not extend to possible sites of greater significance to aborigines alone than the ones protected, one cannot assert that protection of this particular area has a special impact on the aboriginal people. It also assumes that the cultural importance of a particular site can be assessed in isolation from other parts of the cultural heritage. Such logic gives the notion of "special laws" a truncated meaning since the quality of specialness is lost if the law protects more than one interest and benefits, even in an attenuated way, any other group.

The majority of the Court accepted the importance of the preservation of culture to racial identity. It held that if the Tasmanian sites were of particular significance to the aboriginal race, the provisions protecting them would be within section 51(26). That the sites might have been of

<sup>85</sup> See *supra* note 31.

<sup>86</sup> Cf. 56 Austl. L.J.R. at 632 (Gibbs, C.J.); *id.* at 642 (Stephen, J.). One further concession was made by Justice Stephen, that "facts dehors the legislation" might allow a law that appears to be of general application to be characterized as a special law:

Were it possible to say that in this community only Aborigines faced the possibility of racial discrimination, an anti-discrimination law expressed in general terms might perhaps be seen to be no less a special law within par. (26) than would a law expressly confined to the prohibition of discrimination against Aborigines.

*Id.* at 643.

<sup>87</sup> World Heritage Act, *supra* note 61, §§8 and 11.

<sup>88</sup> 57 Austl. L.J.R. at 479 (Gibbs, C.J.). Cf. *id.* at 571 (Dawson, J.).

<sup>89</sup> *Id.* at 479–80 (Gibbs, C.J.); *id.* at 520 (Wilson, J.); *id.* at 571–72 (Dawson, J.).

general significance did not in the view of the majority change this characterization because such an argument "fails to acknowledge that something which is of significance to mankind generally may have a special and deeper significance to a particular people because it forms part of their heritage."<sup>90</sup> Any more limited construction of the federal race power, the majority argued, would effectively deny protection to "[t]he things which are a focus of the life of a race."<sup>91</sup>

#### CONCLUSION

Both the *Koowarta* and the *Dam* cases echo old arguments about the role of federal states in the emerging international order. The minority, in both cases, resists the intrusion of the international sphere into the domestic. The theme of the Australian High Court minorities is no different from that of the Privy Council in 1937 in the *Canadian Labour Conventions* case:

[I]f . . . Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.<sup>92</sup>

Another parallel, seen in the United States during the 1950s, can be found in the "federalism" arguments made by Senator Bricker for his proposed constitutional amendment to the treaty power, which would have reversed *Missouri v. Holland*.<sup>93</sup>

The majority decisions in both *Koowarta* and *Tasmanian Dam* deny, however, the basic incompatibility that some discern between the demands of federalism and effective participation in the international community. They bring Australian jurisprudence in this respect firmly into the modern age. Although a federation may have had its origin in social, economic, political or cultural diversity, any perceived need for its regional units to retain the power to deal with their population or environment as they wish cannot today go unchallenged. Regional autonomy, as Scelle reminded us long ago,<sup>94</sup> can be justified only insofar as the demands of the national and international communities are not in conflict with it. A state in a federation simply cannot isolate itself from international law.

<sup>90</sup> *Id.* at 500-01 (Mason, J.); *id.* at 510 (Murphy, J.); *id.* at 537-40 (Brennan, J.); *id.* at 550-52 (Deane, J.).

<sup>91</sup> *Id.* at 538 (Brennan, J.). The provisions based on the race power were ultimately held invalid because of Justice Deane's decision that they violated the implied constitutional prohibition on acquisition of property by the federal Government without just terms (*see* AUSTL. CONST. sec. 51(31)). 57 Austl. L.J.R. at 555-59. His was the fourth vote against validity when added to those of the Chief Justice and Justices Wilson and Dawson, who had decided the sections were unsupported by the race power.

<sup>92</sup> *Attorney-General (Canada) v. Attorney-General (Ontario)*, 1937 A.C. 326, 354.

<sup>93</sup> 252 U.S. 416 (1920). *See* Bricker & Webb, *Treaty Law vs. Domestic Constitutional Law*, 29 NOTRE DAME LAW. 529, 534-35, 540-41 (1954); L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 948-61 (1973).

<sup>94</sup> Scelle, *Règles générales du droit de la paix*, 46 RECUEIL DES COURS 331, 396 (1933 IV).

## EDITORIAL COMMENTS

### THE ABUSE OF DIPLOMATIC PRIVILEGES AND IMMUNITIES: RECENT UNITED KINGDOM EXPERIENCE

It has frequently been observed that there is generally good compliance with the law of diplomatic immunity because here, almost as in no other area of international law, the reciprocal benefits of compliance are visible and manifest. Virtually every state that is host to a foreign diplomatic mission will have its own embassy in the territory of the sending state. Every state wants its own diplomats operating abroad, and its own diplomatic bags, embassies and archives, to receive those protections that are provided by international law. Honoring those same obligations vis-à-vis the diplomatic community in one's own country is widely perceived as a major factor in ensuring that there is no erosion of the international law requirements on diplomatic privileges and immunities.

Diplomatic law governs the conduct of relations between representative organs of a state operating within the territory of another state, and the receiving state. Its purpose is to facilitate international diplomacy, balancing the pursuit of the foreign policy interests of the sending state with respect for the territorial sovereignty of the receiving state. Diplomatic immunity is an exception to the general rule of territorial jurisdiction. It allows diplomats to be able to carry out their functions within the framework of necessary security and confidentiality. But it still contributes to the balancing of interests between the sending and receiving state, because immunity does not entitle diplomats to flout local laws.

There are many types of missions for the conduct of international diplomacy.<sup>1</sup> To a certain extent, each type has become governed by its own specific body of diplomatic law.<sup>2</sup> But permanent missions established by states within each other's territory have become the mainstay of international intercourse. Until the end of the 1950s, the sources of law governing the missions were largely customary.<sup>3</sup> In 1961 there was

<sup>1</sup> For example, visits by heads of government, or other permanent officials; special missions; official representation at ad hoc or periodic conferences; permanent missions at international organizations.

<sup>2</sup> E.g., *inter alia*, Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS No. 6820, 596 UNTS 261; Convention on Special Missions, Annex to GA Res. 2530 (XXIV) (Dec. 8, 1969); Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, UN Doc. A/CONF.67/16 (Mar. 4, 1975); United Nations Charter of 1945; Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations of 1947, 33 UNTS 261; and many relevant bilateral agreements.

<sup>3</sup> Some early attempts at codifying certain aspects occurred in 1815 (Congress of Vienna) and in the 1920s under the League of Nations. Some 81 nations participated in the conference leading to the 1961 Vienna Convention, building on the commentary prepared by the International Law Commission after study from 1956 to 1959.

concluded the Vienna Convention on Diplomatic Relations.<sup>4</sup> This treaty is agreed to be largely confirmatory of existing customary law, and it has been ratified by the great majority of states, including states as diverse as the United States and Iran, the United Kingdom and Libya.

For about 15 years it was fairly generally felt that the provisions of the Vienna Convention<sup>5</sup> did indeed provide a fair balance between the interests of the sending and receiving states. But in many of the major capitals of the world, it came to be felt that diplomats were abusing the privileged status given to their vehicles, and in particular parking illegally, causing obstructions and failing to pay traffic fines. This feeling was, of course, compounded in a country such as the United States, which was also host in New York to the United Nations and important specialized agencies. By contrast, there was much less public awareness of traffic violations by the diplomatic community in London.<sup>6</sup> On the other hand,

<sup>4</sup> 23 UST 3227, TIAS No. 7502, 500 UNTS 95.

<sup>5</sup> For convenience, in the context of the matters here under discussion, they may be summarized as follows:

16. The Convention identifies (but not in an exhaustive list) the functions of a diplomatic mission (Article 3). It can hardly need saying that terrorism or other criminal activities can never be justified by reference to these functions. The sending State must secure the approval (*agrément*) of the receiving State for the person it seeks to accredit as head of mission, though no comparable approval is needed for diplomats being sent to other posts, save for military attachés (Article 7). The receiving State reserves the right to notify the sending State, without explanation, that a member of the diplomatic staff is *persona non grata* or that any other member of staff is unacceptable (Article 9). The sending State must accredit a designated head of mission (Article 5). The receiving State may set a limit to the size of the mission (Article 11). There are provisions as to rank and formalities (Articles 13 and 18). Certain privileges relating to the flag and emblem are granted (Article 20). The receiving State is to facilitate the acquisition of mission premises (Article 21) and is under a special duty to protect the mission against intrusion or indignity (Article 22(2)). The premises of the mission are inviolable (Article 22). (Though it is not correct, from a legal point of view, to regard them as "extra-territorial".) The archives and documents of the mission are inviolable whether they are on or off the mission premises. The receiving State is to give full facilities for the performance of the functions of the mission (Article 25) and to protect communications for official purposes (Article 27). In this context, the diplomatic bag shall not be opened or detained (Article 27(3)) and the diplomatic courier shall be protected by the receiving State in the performance of his functions (Article 27(5)). The person of the diplomatic agent is inviolable. He is to be treated with respect, protected against attack, and may not be detained or arrested (Article 29). The diplomatic agent is immune from the criminal jurisdiction of the receiving State (Article 31). Even if diplomatic relations are broken off, or if a mission is recalled, the receiving State must continue to protect the mission, its property and archives (Article 45). The main relevant provisions of the Vienna Convention are annexed to this report.

H.C. FOREIGN AFFAIRS COMMITTEE, FIRST REPORT, THE ABUSE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES, REPORT WITH AN ANNEX; TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE; MINUTES OF EVIDENCE TAKEN ON 20 JUNE AND 2 AND 18 JULY IN THE LAST SESSION OF PARLIAMENT, AND APPENDICES (Dec. 12, 1984).

<sup>6</sup> From the period 1974-mid-1984, there was an average of 71,000 canceled parking tickets in London annually. *Id.*, para. 5. The United Kingdom is host to a fairly limited number of international organizations, including the International Maritime Organization (Headquarters Agreement of 1969, Cmd. 3964, later amended three times by exchanges of notes). The privileges and immunities that they have been granted are limited, and they

London has seemed an attractive venue for shoplifting and other offenses. In the period 1974–mid-1984, there were 546 occasions on which persons avoided arrest or prosecution for alleged serious offenses (i.e., offenses carrying a potential sentence of 6 months' imprisonment or greater) because of diplomatic immunity.<sup>7</sup>

In the mid-1970s, more worrying problems developed. It became clear that certain diplomatic missions were holding firearms, contrary to the provisions of local law. Further, it seemed that these firearms were often being imported through the diplomatic bag.<sup>8</sup> In recent years in various Western countries, there have also been terrorist incidents, in which it was believed that the weapons used were provided from diplomatic sources. It was widely thought that certain foreign governments were promoting state terrorism against dissident exiles, through the involvement of their embassies in the country concerned.<sup>9</sup> Normal diplomatic communication with the Libyan Embassy in London was complicated by the fact that (as in other Western capitals) so-called revolutionary committees had taken over the embassy, renamed the embassy the Libyan People's Bureau and refused to designate a person in charge of the mission. The bizarre events of this period, and the response of the United Kingdom Government to them, are beyond the scope of these editorial comments.<sup>10</sup> In February 1980, further internal upheavals occurred in the Libyan People's Bureau in London, giving rise to further diplomatic problems.

On April 17, 1984, an orderly demonstration was held by Libyan opponents of Colonel Qaddafi's Government, on the pavement in St. James's Square, London, opposite the People's Bureau. Both the Foreign Office in London and the British Ambassador in Tripoli had been warned the day before that if the demonstration were to be allowed to go ahead, Libya "would not be responsible for its consequences." Shots were fired from the windows of the Bureau, killing Woman Police Constable Fletcher, who was on duty in the square. The events immediately following were these:

74. . . . The Libyan authorities in Tripoli were immediately asked to instruct those inside the Bureau to leave the building and to allow it to be searched for weapons and explosives. This request was refused. The British Embassy in Tripoli was the scene of hostile demonstrations and certain British citizens were unjustifiably arrested and detained.

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have not been a major source of traffic or parking violations. Further, the Foreign and Commonwealth Office indicated that "very few breaches of our law have been committed by persons connected with international organizations." FOREIGN AFFAIRS COMMITTEE REPORT, para. 19 n.26.

<sup>7</sup> *Id.*, para. 5.

<sup>8</sup> Article 27(4) of the Convention, *supra* note 4, provides that the bag may contain only diplomatic documents or articles intended for official use.

<sup>9</sup> For details of such incidents in the United Kingdom, see FOREIGN AFFAIRS COMMITTEE REPORT, paras. 68, 81–83.

<sup>10</sup> But are detailed in *id.*, paras. 69–72.

75. Her Majesty's Government proposed that "as a basis for terminating relations by agreement" that:

(1) Occupants of the Bureau and all other Libyan diplomatic staff in the country should have safe conduct out of the country. (It will be noted that the proposal covered, so far as those on Bureau premises were concerned, those who had no diplomatic status as well as any who might have had such status. The Government indicated that in its view evidence capable of sustaining criminal charges would in any event have been difficult to achieve in respect of such persons.)

(2) Our own diplomats were to leave Libya in safety.

(3) We should be satisfied that all weapons and explosives were removed from the Bureau and that it could no longer be used for terrorist acts.

These proposals were refused.

76. On 20 April a bomb exploded in the luggage hall of Heathrow airport injuring 25 people. The Government have reserved their position as to whether it was connected with the incidents in St. James's Square, though there was wide press speculation that this was in fact the case. On 22 April the Libyans were notified that diplomatic relations would terminate at 6.00 p.m. that day and that all diplomatic staff and other persons in the Bureau were to leave by midnight 29-30 April. Two Libyans (not at the Bureau) were deported after the shooting of WPC Fletcher. Various measures were announced by the Home Secretary for tightening the exercise of his discretionary powers in respect of Libyans already in the country or wishing to enter.

77. The Bureau was evacuated on 27 April 1984. Those leaving were questioned and electronically searched. Diplomatic bags that left the Bureau were not searched or scanned. The Bureau was sealed, and on 30 April 1984 was entered by the British authorities, in the presence of a representative of the Saudi Arabian Embassy, and searched. Weapons and relevant forensic evidence were found.<sup>11</sup>

There was, as might be expected, general outrage at these events. The public and many legislators were clearly deeply disturbed that the international law of diplomatic immunity apparently prevented the Bureau from being entered, and those responsible from being arrested. More specifically, it was widely felt that diplomats acting in a way incompatible with their diplomatic status should not benefit from an immunity granted to assist the orderly conduct of diplomatic relations. It was suggested that some way should be found of searching diplomatic bags that were suspected of containing either drugs or weapons. And there was a widespread sentiment that premises which were a base for unlawful acts should not be accorded inviolability. It was argued variously that a proper interpretation of the Vienna Convention would support the view that immunity and inviolability fell away when diplomats and missions abused their positions; but that if the Vienna Convention made these desirable

<sup>11</sup> *Id.*, paras. 74-77.

outcomes impossible, then the Convention should be amended or denounced.

These and related issues have now been systematically reviewed in a study prepared by the Foreign Affairs Committee of the United Kingdom House of Commons. This committee received written and oral evidence from the Foreign Secretary and his officials (including the Legal Adviser to the Foreign and Commonwealth Office), from the Home Office, and from others well placed to offer informed views.<sup>12</sup> The detailed report of the Foreign Affairs Committee<sup>13</sup> consists of some 40 pages of analysis and commentary, supplemented by 94 pages of detailed appendixes, including memorandums from the Foreign and Commonwealth Office and submissions by interested parties.

Many detailed points of interest are found in the report. In addition, some important general points emerged. It became clear that diplomatic law is not only about the balancing of legitimate interests between the sending state and the receiving state. There is another factor often at play: the presence abroad, in the territory of the sending state, of an expatriate community of the receiving state. (There were, for example, some 8,000 Britons resident in Libya in April 1984.) The extent to which countries will avail themselves of the opportunities for lawful response to abuse of diplomatic immunities will depend in large measure upon whether that expatriate community is perceived to be at risk. That is something that the balanced text of the Vienna Convention cannot provide against—and by the same token, any amendment of that text or withdrawal from its obligations would not change that reality.

As has been briefly explained above, the Libyan Bureau incident in April 1984 concerned the inviolability of the embassy, the protection of the diplomatic bag from being opened or detained, and the personal immunity of the diplomats in the Bureau.<sup>14</sup>

<sup>12</sup> These included Sir Francis Vallat, former Legal Adviser to the FCO and former member of the International Law Commission, and Sir Ian Sinclair, current member of the ILC and recently retired Legal Adviser to the FCO.

<sup>13</sup> See note 5 *supra*.

<sup>14</sup> Further questions relating to the bag and the status of diplomats arose in connection with the abduction in July 1984 of Umaru Dikko, a former Minister of the deposed Shagari Government in Nigeria. In the words of the FOREIGN AFFAIRS COMMITTEE REPORT, para. 106:

It would appear that he was heavily drugged and placed in a crate. Two large crates arrived at Stansted airport at about 4 pm to be loaded on to a Nigerian Airways aircraft. The crates were attended by a member of the Nigerian Government service, who held a diplomatic passport but was not a member of the mission to the UK and had no diplomatic status in this country. He made no protest when the crates were required to be opened. Members of the staff of the High Commission who were at Stansted were invited to inspect the crates. One crate contained Mr Dikko, who was unconscious, and another man who was conscious and in possession of drugs and syringes. The other crate contained two men, both conscious. A total of 27 people, including the three other than Mr Dikko who were found in the crates, were arrested. Charges were preferred against three persons, none of whom claimed diplomatic immunity at the time, though one has since done so.

His claim is being pursued through the English courts, but has not so far succeeded. This

## INVIOABILITY OF THE PREMISES OF AN EMBASSY

Article 22(1) of the Convention provides that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Article 22(3) further provides that "[t]he premises of the mission . . . shall be immune from search, requisition, attachment or execution." It is clear, notwithstanding popular and ill-informed views to the contrary,<sup>15</sup> that inviolability of premises is not lost by the perpetration from them of unlawful acts. Both the International Law Commission in its preparatory work and the conference at which the Vienna Convention was drafted deliberately rejected<sup>16</sup> the idea of specified exceptions in the face of manifest abuse. Inviolability had to be absolute if the door was not to be opened to possible abuse by the receiving state.<sup>17</sup>

That being said, there are still two difficult related issues that require mention. They concern, respectively, the relationship of general treaty principles on the one hand, and of the concept of self-defense on the other, to the notions of inviolability under the Convention. Although a fundamental breach of treaty (which the use of embassy premises for terrorism surely is) would normally allow another state party to the treaty to be relieved of its obligations vis-à-vis the violating state, the drafting history of the Vienna Convention seems to make the operation of this principle inappropriate. This conclusion is buttressed by the fact that the Vienna Convention provides for its own remedies in case it is violated—the severing of diplomatic relations is available as a response to what one could term “a fundamental breach.”

Is there a principle of self-defense that continues to exist side by side with the Convention, allowing the authorities of the receiving state to take certain action against an embassy, notwithstanding Article 22 of the Convention? In a very interesting statement, the Legal Adviser to the Foreign and Commonwealth Office took the view that “self defence applies not only to action taken directly against a state but also to action directed against members of that state.”<sup>18</sup> Sir John Freeland thought that where the classic requirements (“A necessity of self defence, instant, overwhelming, leaving no choice of means and moment for deliberation”<sup>19</sup>) were met, forcible entry of embassy premises might be justified in self-defense. (He did not believe that the events as they unfolded in London on April 17,

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plaintiff claims that as he is a diplomat accredited to a country other than the United Kingdom, he is entitled to immunity in the United Kingdom.

<sup>15</sup> See Ambassador Arthur Goldberg, *The Murder in St. James's Square*, ENCOUNTER, November 1984, at 67–70; and response by Sir Ian Sinclair, *id.*, November 1985, at 76–78.

<sup>16</sup> M. HARDY, MODERN DIPLOMATIC LAW 44 (1968).

<sup>17</sup> See evidence of Sir Francis Vallat, who had participated at the conference leading to the formulation of the Convention. FOREIGN AFFAIRS COMMITTEE REPORT, para. 91.

<sup>18</sup> *Id.*, para. 94.

<sup>19</sup> The Caroline, 29 BRIT. FOREIGN & ST. PAPERS 1137–38 (1840–41); 30 *id.* at 195–96 (1841–42).



1984 met that test.) This writer remains skeptical as to the applicability at all of the international law concept of self-defense to violent acts by the representatives of one state within the territory of another, directed against the latter's citizens.

#### SEARCHING OF DIPLOMATIC BAGS

Two main grounds have been advanced for suggesting that one does not have to treat as mandatory the provision in Article 27(3) of the Convention that "[t]he diplomatic bag shall not be opened or detained." The first is that the inviolability of the bag is to protect diplomatic materials, but not materials that do not fall in that category—and indeed constitute an abuse of the diplomatic bag. The second is that abuse by members of a mission of the functions protected under the Convention entails forfeiture of the protection of the Convention. The *travaux préparatoires* of the Convention are not quite as categorical on these related points as they are on the lack of any exception allowing uninvited entry onto diplomatic premises. But they are still clear enough, and the policy considerations are the same. There is no way of ascertaining that a bag contains illicit materials save by examination; and that possibility gives too much opportunity to a receiving state to interfere with the proper flow of diplomatic materials. Even those states that have suffered most in recent years from the abusive use of the diplomatic bag that has undoubtedly occurred show little enthusiasm for a departure from the prohibition of search in Article 27(3).<sup>20</sup>

The Legal Adviser to the Foreign and Commonwealth Office took the view, on balance, that electronic scanning is not unlawful under the Convention. Acknowledging that some regard scanning as "constructive opening," Sir John Freeland noted that<sup>21</sup> Article 27 of the Convention requires only that the bag not be "opened or detained" and does not accord full inviolability. In the view of the Government, scanning or other remote examination by equipment or dogs would not be unlawful under Article 27. However, the Government was at pains to point out that it did not in fact scan, nor did it wish to do so. It expressed doubts on technical grounds about the advantage to be gained from doing so (scanning can identify the existence of a problem, but its precise nature would often require the opening of the bag); further, various techniques exist for

<sup>20</sup> This question is before the International Law Commission in the context of its work on the status of the diplomatic courier and the unaccompanied diplomatic bag. One possibility is that in a new instrument states should be given the option to reserve the right to apply the safeguard found in Article 35(3) of the Convention on Consular Relations, *supra* note 2, which provides that if the receiving state has serious reason to believe the bag contains nonpermitted articles, it may request that the bag be opened in its presence. If this request is refused, the bag shall be returned to its place of origin. For the operation of reservations in the terms under the Vienna Convention on Diplomatic Relations, and the UK position thereon, see FOREIGN AFFAIRS COMMITTEE REPORT, paras. 98–191.

<sup>21</sup> FOREIGN AFFAIRS COMMITTEE REPORT, para. 29.

disguising the exact identity of items that might be revealed by a scan.<sup>22</sup> Obviously, there was also concern about adverse reciprocal consequences if scanning were to be introduced. It is not correct that states acting lawfully have nothing to fear from scanning: such a practice might reveal sensitive information about, e.g., types of ciphers in use by the sending state.

The United Kingdom's decision not to search the diplomatic bags of the Libyans expelled from the Bureau was generally assumed by the press and television reporters at the time to be part and parcel of the obligations laid upon the United Kingdom by the Vienna Convention. The United Kingdom Government, while not positively affirming this, did not take any of the parliamentary opportunities to explain that this was not quite the case. In fact, Libya's accession to the Vienna Convention had been qualified by a reservation that provided that were it to entertain

strong doubts that the contents of a diplomatic pouch include items which may not be sent by diplomatic pouch in accordance with paragraph 4 of article 27 of said Convention, the Socialist People's Libyan Arab Jamahiriya reserves its right to request the opening of such pouch in the presence of an official representative of the diplomatic mission concerned. If such request is denied by the authorities of the sending state, the diplomatic pouch shall be returned to its place of origin.<sup>23</sup>

The United Kingdom made no objection to this reservation, believing that it was not incompatible with the object and purpose of the Convention, and that it represented customary international law as it was before the Convention. Indeed, the United Kingdom had introduced an unsuccessful amendment to Article 27 to much the same effect.<sup>24</sup>

In fact, the Libyans have never relied upon this reservation to ask for a search. Nonetheless, the potential effect of the reservation was there. The Libyan reservation had opened the possibility of searching the bag and it was not necessary for Libya to have made even a request for a search for that reservation to be used reciprocally by a nonobjecting party to the Convention. In response to questioning by the committee, the Legal Adviser to the Foreign and Commonwealth Office confirmed the legal position, and further agreed that, therefore, the decision not to search the bags was political and not legal. The committee in its report did not dissent from the political judgment made.<sup>25</sup>

Whether remedies available under and within the Convention should be used will always be subject to political judgment. And sometimes it may be convenient for a government to let it be supposed, in exercising

<sup>22</sup> *Id.*, paras. 31-34. This matter, too, is under consideration by the International Law Commission, with a proposal to prohibit any kind of examination directly or through electronic or mechanical devices.

<sup>23</sup> MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1982, UN Doc. ST/LEG/SER.E/2, at 55 (1983).

<sup>24</sup> FOREIGN AFFAIRS COMMITTEE REPORT, para. 99.

<sup>25</sup> *Id.*, para. 101.

political judgment, that its hands are tied by the requirements of international law.

#### CRIMINAL OFFENSES AND PERSONAL IMMUNITIES

39. The person of a diplomatic agent is inviolable and he may not be arrested or detained (Article 29, Vienna Convention on Diplomatic Relations). A diplomatic agent is immune from the criminal jurisdiction of the receiving State, and immune from the civil and administrative jurisdiction save in certain specified cases (Article 39). He is further exempt from local taxes (Article 34). These privileges and immunities are extended to the members of his family forming part of his household, provided that they are not nationals of the receiving State (Article 37). The same privileges and immunities are extended to the members of the administrative and technical staffs of the mission, with the same provisions for their families. The only difference is that immunity from civil and administrative jurisdiction will only be in respect of acts performed within the course of their duties.

42. All persons enjoying privileges and immunities under the Convention (or similar conventions applicable to consular staff or staff of international organisations) are under a duty to respect the laws and regulations of the receiving State, and not to interfere in its internal affairs (Article 41). That a diplomat is indeed bound by the laws of the receiving State is underlined by the provision of Article 31(1) that his immunity does not exempt him from the jurisdiction of the sending State. At the same time, it is not correct that when a diplomat violates this duty he loses his immunity. Such a reading is inconsistent with the immunities given, which operate precisely in respect of such alleged violations, and which, in the case of diplomatic agents, apply even to unofficial acts. An argument can be made that when diplomats act in fact as terrorists, they are not diplomats at all, and thus must lose the benefit of those immunities that diplomats are entitled to. But the right view seems to be that a person remains an accredited diplomat until the receiving State requires him to be withdrawn.

This view would seem to accord with the general ethos of the Convention that there should be no exceptions to its terms.<sup>26</sup>

The Foreign Affairs Committee felt that this was not an intolerable situation and that the Convention provided a remedy in the ability of the receiving state to declare a diplomat *persona non grata*. In cases concerning offenses against the security of the state, offending diplomats were routinely declared *persona non grata*. But there had been other occasions where interference in internal affairs was suspected, or where local law had been violated, or where threats had been issued, and no request had been made for the person or persons to be withdrawn. The committee recommended a greater readiness to use this remedy.

This study was based, as has been explained above, on the submission of detailed evidence from a wide variety of interested parties, and oral examination of witnesses. It concluded that amendment<sup>27</sup> of the Vienna

<sup>26</sup> *Id.*, paras. 39 and 42.

<sup>27</sup> The amendments considered included limiting the immunity from jurisdiction of accredited diplomats, technical and administrative staff, and their families; removing personal

Convention was not only virtually impossible to achieve, but of doubtful desirability:

[I]t is doubtful whether, from the UK's point of view, amendment is even desirable. In respect of all these matters we were constantly reminded of the importance of reciprocity—namely, that the privileges and immunities operate to provide a very real protection for our diplomats and their families overseas, and that action should not be taken which would expose them to personal danger or make the carrying out of their diplomatic tasks more difficult or even impossible. The UK maintains a substantial number of diplomatic posts overseas and there is little doubt that, in many of these posts, the protections afforded by the Convention are necessary for the effective and safe performance of their functions.<sup>28</sup>

More difficult was the issue whether security in the streets of London could and should be facilitated by changing the practice regarding demonstrations outside embassies. Unlike the United States and certain other states, the United Kingdom has no statutory requirement prohibiting demonstrations within a specified distance of diplomatic premises. The matter is simply dealt with by local acts allowing for the direction of routes of processions and demonstrations, the maintenance of order and prevention of obstructions,<sup>29</sup> and the control of public order generally.<sup>30</sup> There is no special power given to police commissioners in respect of offenses at or near diplomatic premises.

Article 22 of the Vienna Convention nonetheless places on the receiving state "a special duty to prevent any disturbance of the peace of the mission or impairment of its dignity." Article 22 (together with other articles) is given the force of law in the United Kingdom by the Diplomatic Privileges Act 1964.<sup>31</sup> The view was offered in certain quarters that the absence of legislation to keep demonstrations at a certain distance from embassies is incompatible with the obligations under Article 22.<sup>32</sup>

Is the peace of the mission or the impairment of its dignity prevented by peaceful demonstrations in the immediate vicinity? Or is the better view that Article 22 is not meant to insulate the foreign mission from expressions of public opinion within the receiving state (provided always that there is free and safe access and egress for the members of the mission, and no real fear of danger to mission staff or damage to the premises)?

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immunity after participation in acts of state terrorism; obligatory opening of the diplomatic bag upon request following reasonable suspicion or return of the bag to its point of origin; withdrawal of the inviolability of diplomatic premises if they have been used for acts of state terrorism; electronic scanning of the diplomatic bag (insofar as that would entail a formal amendment).

<sup>28</sup> FOREIGN AFFAIRS COMMITTEE REPORT, para. 56.

<sup>29</sup> Metropolitan Police Act 1839, 2 & 3 Vict., ch. 47, §52.

<sup>30</sup> Public Order Act 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6, §3.

<sup>31</sup> Ch. 81.

<sup>32</sup> See, e.g., Memorandum of Professor Colonel G. I. A. D. Draper, FOREIGN AFFAIRS COMMITTEE REPORT, App. 6, at 74.

During the summer of 1984, a police commander moved a demonstration away from the east pavement of Trafalgar Square outside the South African High Commission, arresting those who refused to move. This incident was interesting in several respects. Demonstrations had taken place on the east pavement of Trafalgar Square every Friday for 2 years. On this occasion, though the demonstration did not differ from those held previously, the responsible police commander took the view that it violated the Diplomatic Privileges Act. He arrived at this view without consulting the Foreign and Commonwealth Office. The Magistrates Court that dealt with the case of one of the persons arrested found that impairment of dignity required abusing or insulting behavior, and that political demonstrations per se do not amount to such.<sup>33</sup>

The present writer welcomes this robust approach to Article 22 of the Convention, and also the decision of the Foreign Affairs Committee not to recommend statutory distances for demonstrations. As the committee noted, a breakdown of public order outside the mission premises (for which there are appropriate statutory powers) would put in jeopardy the fulfilling of obligations under Article 22; "an orderly expression of opposition to the policies of the sending State cannot of itself do so."<sup>34</sup>

At the end of the day, terroristic abuse of diplomatic status can be controlled neither by moving demonstrations away from embassies nor by trying to amend the Vienna Convention. What is needed is close coordination between the various parts of government, and international security cooperation.<sup>35</sup> Governments must keep themselves more fully informed than they have sometimes appeared to be in the past, and should not, for the sake of promoting trade or other reasons, seek to accommodate those who are reluctant to conform to the requirements of the Vienna Convention. Above all, those remedies available for abuse in the Convention—especially the power to limit the size of the mission, to declare a diplomat persona non grata—should be used with firmness and vigor, and not just reserved for matters related to espionage.

As is so often the case, legal means are at hand; but they need to be matched by political will.

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On April 23, 1985, the Government issued its reply to the Foreign Affairs Committee's report (Cmd. 9497). It accepted all the major recommendations of the report. The Government's report will be briefly reviewed in the next issue of the *Journal*.

ROSALYN HIGGINS\*

<sup>33</sup> Regina v. Roques, Bow Street Magistrates Court, June 1984. For details, see FOREIGN AFFAIRS COMMITTEE REPORT, para. 50.

<sup>34</sup> FOREIGN AFFAIRS COMMITTEE REPORT, para. 48. This was a difficult issue for the committee, and a different view was strongly urged by one member, Ivan Lawrence, Q.C., M.P. See *id.* at xlvii.

<sup>35</sup> See *id.*, paras. 125–126, 116–118.

\* The present writer acted as specialist adviser to the Foreign Affairs Committee at all stages of its work.

*NICARAGUA V. UNITED STATES AS A PRECEDENT*

In an attempt to assess the significance of the jurisdictional phase of *Nicaragua v. United States*,<sup>1</sup> one might ask such questions as: Did the Court misinterpret its Statute and its precedents, and if so, how serious was the misinterpretation? Did the Court misinterpret the relevant U.S. instruments: the Vandenberg (multilateral treaty) reservation to the U.S. Article 36(2) Declaration<sup>2</sup> and the Shultz letter of April 6, 1984?<sup>3</sup> At another level, did the Court's rejection of all the U.S. jurisdictional arguments reveal such anti-American bias that the United States should withdraw its Declaration? If not, should it carry through with its announced intention to modify its Declaration for future cases?<sup>4</sup>

I will evade these questions and ask instead: What jurisdictional precedents have been created, and how do they affect the U.S. position regarding the Court? I shall not deal with admissibility precedents, as distinguished from jurisdictional precedents. I shall assume—contrary, perhaps, to the assumption of the current administration in Washington—that the Court as a whole is not infected with bias against the United States. Of course, I shall also assume that for practical purposes, the Court's judgments create precedents despite Article 59 of its Statute.

The Court's treatment of Nicaragua's 1929 Declaration creates two precedents, one of which is no precedent at all for any future case not involving Nicaragua. The nonprecedent emanates from the Court's view that the 1929 Declaration is deemed an acceptance of compulsory jurisdiction under ICJ Statute Article 36(5). So far as appears, no state other than Nicaragua made a declaration under the Statute of the Permanent Court without also ratifying the Protocol of Signature of its Statute. Thus, when the Court held that a nonbinding, unrevoked declaration under the former Statute was "still in force" under Article 36(5) of the new Statute, it created a precedent applicable only to Nicaragua. Moreover, I suspect that in a case involving an original UN member, only those committed to legal technicalities would take serious offense at an equation that starts with a properly filed (but inchoate) declaration, adds a properly ratified ICJ Statute and comes out with a declaration in force.<sup>5</sup> The United States may not like the holding insofar as it relates to the particular case, but the precedent for future cases is harmless or very nearly so.

<sup>1</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 ICJ REP. 392 (Judgment of Nov. 26), 24 ILM 59 (1985).

<sup>2</sup> 1982-1983 Y.B. ICJ 88-89.

<sup>3</sup> Letter from Secretary of State George Shultz to the UN Secretary-General, 23 ILM 670 (1984).

<sup>4</sup> See the State Department's statement in 79 AJIL 439, 441 (1985), 24 ILM 246, 248 (1985).

<sup>5</sup> The State Department has said, "The Court's theory is flatly inconsistent with two prior decisions of the Court (the *Aerial Incident* and *Barcelona Traction* cases)." 79 AJIL 423, 425 (1985), 24 ILM 249, 253 (1985). The theory arguably is inconsistent with some of the language in those judgments, but the cases themselves are distinguishable.

The more significant precedent involving the 1929 Declaration is that when UN publications identify a declaration as being in force, it is an assertion that could (through acquiescence) cause the Declaration to become binding under Article 36(2). This could be so even though, as in the case of Nicaragua, a technical defect pertaining to the Declaration appears in the same publications. In fact, notice of the defect may be essential to the process, since it is what gives other states reason to object and thus gives meaning to their silence if, indeed, they remain silent. This, too, is not a particularly ominous precedent, so long as it is limited to declarations that have been properly deposited and do not contain such intrinsic defects as to be void. Assertion-acquiescence, after all, is a familiar lawmaking process in international affairs, and there is no particular reason to limit the process to assertions made by states.<sup>6</sup>

One might argue that this assertion-acquiescence precedent is troublesome because it found ambivalent conduct by Nicaragua to be acquiescence—and to work in Nicaragua's favor. In fact, Nicaragua's conduct, from the inception of the UN Charter, through the *King of Spain* case,<sup>7</sup> to the bringing of proceedings against the United States, might be regarded as deliberately ambivalent. Nicaragua may well have wanted to keep its options open. Thus, it might have denied that it was bound by an Article 36 Declaration if it had been in its interest to deny it the first time the issue could not be avoided. If Nicaragua was indeed trying to have it both ways, we might deplore such conduct, but we should not be overly concerned by the precedential burden of a holding that says the conduct amounts to an acquiescence making the Declaration binding. The fact that the acquiescence worked to Nicaragua's advantage in the present case does not render the precedent any more foreboding than if it had worked to Nicaragua's disadvantage.

The Court's treatment of the U.S. notification of April 6, 1984 did not set particularly disturbing precedents either. It is relatively noncontroversial to treat what was styled a "modification" of the U.S. Declaration as at least a partial and temporary termination. None of the judges had any serious difficulty with this. In the future, states will be on notice that any limits on termination set by themselves or by applicable international norms will govern any significant changes they may wish to make in their declarations.

Relying on the *Nuclear Tests* cases,<sup>8</sup> the Court said in paragraph 60 that Article 36(2) declarations, "even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration." Thus, the United

<sup>6</sup> A similar assertion-acquiescence process has given authoritative effect to the International Labor Office's interpretation of ILO conventions. See ILO Governing Body, Minutes of the Ninth Session 365-66 (1921). Nor is the process unknown in other international organizations.

<sup>7</sup> Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (*Hond. v. Nicar.*), 1960 ICJ REP. 192 (Judgment of Nov. 18).

<sup>8</sup> *Nuclear Tests* (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ REP. 253, 457 (Judgments of Dec. 20).

States was bound by its 6-month notice-of-termination provision. To treat Article 36(2) declarations as binding bilateral engagements is to go beyond anything the Court had held before, but some of its prior decisions certainly pointed in that direction.<sup>9</sup> Rosenne has argued against such a result,<sup>10</sup> but one might well argue for it on the ground that it lends stability to the Court's none-too-solid jurisdictional base. There is something to be said for a rule that does away with just the sort of race to the courthouse that occurred in April 1984. Now that the United States and others know that Article 36(2) declarations are binding, they can plan accordingly. One would hope that their plans do not include withdrawing entirely from the Court's Article 36(2) jurisdiction; at most, a change in the 6-month notice-of-termination provision would suffice.

In paragraph 63, the Court indicated—though with some equivocation—that if a state has said nothing in its declaration about notice of termination, it may not simply terminate the declaration with immediate effect. Instead, a reasonable period of notice would be required. This is nothing more than the customary rule that is made specific for parties to the Vienna Convention on the Law of Treaties<sup>11</sup> by Article 56(2), which requires 12 months' notice. The Court did not say that 12 months would be the reasonable period of notice for termination of an Article 36(2) declaration. Presumably, a shorter period would normally be sufficient. There is nothing very upsetting about this, particularly if one accepts the argument that there is something to be gained from the stability of treating declarations as a series of bilateral obligations.

*Nicaragua v. United States* precludes a respondent state that has undertaken to give notice of termination from relying, under the banner of reciprocity, on the absence of any notice-of-termination provision in the applicant state's declaration. This constraint does not strike at the heart of the reciprocity doctrine, which is intended to limit the Court's subject matter jurisdiction to the area of mutual assent between the parties. To carry the doctrine any further would be simply to give blind obedience to it. Surely the United States can live with this aspect of the Judgment.

The Court's treatment of the U.S. Vandenberg (multilateral treaty) reservation is troublesome, until one assesses the outcome in light of the apparent purpose of the reservation. Nicaragua alleged that the United States violated several multilateral treaties by taking hostile action in concert with Honduras, Costa Rica and El Salvador. Since those states are also parties to the treaties, and since any outcome would necessarily "affect" how the United States could lawfully act in concert with them toward Nicaragua, they would necessarily be affected by the decision if we use the word "affected" in its everyday sense. To say that this relates

<sup>9</sup> See Case concerning Right of Passage over Indian Territory (Port. v. India), Preliminary Objections, 1957 ICJ REP. 125, 146 (Judgment of Nov. 26); The Electricity Company of Sofia and Bulgaria (Belg. v. Bulgaria), 1939 PCIJ, ser. A/B, No. 77, at 81.

<sup>10</sup> 1 S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 413-14 (1965).

<sup>11</sup> UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969).



to the merits, and thus to postpone consideration beyond the jurisdictional stage, is arguably to nullify a significant reservation that goes specifically to the jurisdictional question. Moreover, it virtually ensures that the Vandenberg reservation will not be applied at all, even on the merits, because the Court will conclude that states not parties to the proceedings are not "affected" by the decision in light of ICJ Statute Article 59.

The potential mischief of such a precedent is not alleviated very much by the argument that most or all of the multilateral treaty norms at stake are customary norms as well. Of course, the Vandenberg reservation does not apply to custom. If the Court had simply said that, and had let the proceedings go forward on the basis solely of alleged violations of custom (even of custom embodied in multilateral treaties), the United States could certainly live with the precedent. The trouble is that not all provisions in multilateral treaties simply reflect custom, and the precedent the Court articulated would seem to apply equally to the noncustomary provisions.

The precedent seems less troublesome, however, if one looks at the apparent purpose of the Vandenberg reservation. Its legislative history suggests that it was intended to protect the United States from decisions that would place it at a disadvantage relative to its similarly situated multilateral treaty partners who could not be made parties to the proceedings.<sup>12</sup> This could happen, for example, if a dispute arose between the United States and a Third World state under a multilateral treaty containing provisions that effectively place developed and developing countries into separate interest groups. In a proceeding brought against the United States, a decision by the Court interpreting the treaty adversely to U.S. interests would place a burden on the United States that would not be shared—at least, not formally—by other developed countries that are parties to the treaty but not parties to the proceedings. *Nicaragua v. United States* is not such a case, and the Court's decision would not preclude the use of the Vandenberg reservation in such a case.

So far, the precedents seem manageable. What may not be manageable is the precedent arising from the Court's treatment of the compromissory clause in the Nicaragua-United States Treaty of Friendship, Commerce and Navigation.<sup>13</sup> We may leave aside the question whether a compromissory clause that applies to treaty-related disputes "not satisfactorily adjusted by diplomacy" may be invoked in the absence of any prior diplomatic effort focusing on the treaty. Far more disquieting is the Court's willingness to use the compromissory clause relating to interpretation or application of an essentially commercial treaty as a means for asserting jurisdiction over a noncommercial dispute that could fit within the provisions of the treaty, if at all, only by forcibly extracting those provisions from their context. The Court accepted, almost without discussion, Nicaragua's afterthought argument that the U.S. use and support of armed force against Nicaragua raised issues of interpretation or application of the

<sup>12</sup> See 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1302-03 (1971).

<sup>13</sup> Jan. 21, 1956, Art. XXIV(2), 9 UST 449, TIAS No. 4024, 367 UNTS 3.

following FCN Treaty provisions (as paraphrased in paragraph 82 of the Judgment):

*Article XIX:* providing for freedom of commerce and navigation, and for vessels of either party to have liberty "to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation", and to be accorded national treatment and most-favored-nation treatment within those ports, places and waters.

*Article XIV:* forbidding the imposition of restrictions or prohibitions on the importation of any product of the other party, or on the exportation of any product to the territories of the other party.

*Article XVII:* forbidding any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either party.

*Article XX:* providing for freedom of transit through the territories of each party.

*Article I:* providing that each party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other party.

The precedent thus set is that the Court has jurisdiction over a dispute that might fall within some of the literal terms of a treaty, without regard to the context, object or purpose of the treaty, if the treaty contains a compromissory clause referring to its interpretation or application. This is an unsettling precedent for the many U.S. treaties containing such compromissory clauses.<sup>14</sup> Like the clause in the Nicaragua-United States FCN Treaty, many of those compromissory clauses provide, or may reasonably be interpreted to provide, that any one party may invoke the clause without the concurrence of any other. If it may do so on grounds as flimsy as Nicaragua's, the United States—and other treaty parties as well—may find themselves defending on the merits in a good many proceedings they had no reason to expect would get that far.

Even more troubling, the precedent does not bode well for the long awaited ratification or effective implementation of human rights treaties containing compromissory clauses like that in the Nicaragua-U.S. FCN Treaty. That would include the Genocide Convention<sup>15</sup> and the Racial Discrimination Convention.<sup>16</sup> One of the objections to ratification of those Conventions has been that the United States could find itself hauled into the World Court on flimsy grounds. For the first time, that objection

<sup>14</sup> As of September 1984, there were 40 such multilateral treaties and another 40 such bilateral treaties. See *Genocide Convention: Hearing on Executive Order Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 63 (1984). For a list of the multilateral treaties, see S. EXEC. REP. NO. 50, 98th Cong., 2d Sess. 37-41 (1984).

<sup>15</sup> Dec. 9, 1948, 78 UNTS 277.

<sup>16</sup> Mar. 7, 1966, 660 UNTS 195.

seems to have some substance. It need not block ratification, but it certainly gives ammunition to those who would do so.

In an attempt to forestall this eventuality, the current administration has agreed in principle to a reservation to the Genocide Convention that would preclude ICJ jurisdiction under the compromissory clause unless all disputing parties agree to it.<sup>17</sup> Such a reservation probably would be effective, despite the argument by some Western states that the Eastern bloc's reservations to the compromissory clause of the Genocide Convention are inconsistent with its object and purpose. The attachment of such a reservation may even be the only prudent way to proceed, even though it means forgoing any opportunity to bring before the ICJ those states parties that are much more likely than the United States to engage in practices that violate the letter and spirit of human rights conventions.

In short, *Nicaragua v. United States* does not justify withdrawal of the U.S. Article 36(2) Declaration. It probably does not even justify substantial modification of the Declaration. The case does create more than a little concern, though, about the use in treaties of compromissory clauses referring disputes to the International Court of Justice at the behest of any party.

FREDERIC L. KIRGIS, JR.

#### NICARAGUA AND INTERNATIONAL LAW: THE "ACADEMIC" AND THE "REAL"

The decision of the United States to withdraw from the International Court of Justice proceedings in *Nicaragua v. United States* had an unexpected consequence: candor. A month after the announced withdrawal, Secretary of State Shultz suggested, and President Reagan later confirmed in a press conference,<sup>1</sup> that the goal of U.S. policy was to overthrow the Sandinista Government of Nicaragua. Of course, this is precisely what Nicaragua all along had alleged to be the U.S. goal. But while the case was actively pending, the United States could not concede that goal without serious risk of undermining its litigating position.

When the United States was still participating in the case, it argued strenuously to the Court that Nicaragua was engaged in an armed attack against its neighbors, carried out not only by supporting armed groups engaged in military and paramilitary activities in and against El Salvador (and on a smaller scale against Costa Rica, Honduras and Guatemala), but also by direct armed incursions across its border into Honduras and Costa Rica. Any military activity by the United States in response was within the exercise of its "inherent right of self-defense."<sup>2</sup>

<sup>17</sup> See Wash. Post, Mar. 6, 1985, at A8, col. 5.

<sup>1</sup> President's News Conference, N.Y. Times, Feb. 22, 1985, at A10, cols. 1, 3.

<sup>2</sup> Counter-Memorial of the United States of America (*Nicar. v. U.S.*) 220, para. 517 (submitted by the U.S. Government to the Court Aug. 17, 1984).

Moreover, as Davis R. Robinson, Legal Adviser to the Department of State, summarized in the previous issue of the *Journal*, the self-defense nature of the U.S. position in turn meant that "[t]his is a classic case arising under chapter VII of the United Nations Charter."<sup>3</sup> As such, the case was a political question for resolution by the Security Council and not suitable for adjudication by the International Court of Justice. Professor Louis B. Sohn, who assisted in the drafting of the UN Charter and is considered a leading scholar of the United Nations, argued the political question position for the United States in the *Nicaragua* case. He surely knew that if the Court had accepted his argument and held that Nicaragua's Application was nonjusticiable, the United States would use its veto power in the Security Council to paralyze any UN action in the case.

In its Judgment on jurisdiction, the Court unanimously rejected the nonjusticiability argument. It pointed out that Article 24 of the Charter gives to the Security Council "primary responsibility for the maintenance of international peace and security," but that "primary" does not mean "exclusive."<sup>4</sup> It also reminded the United States that the Court was capable of dealing with the "legal" aspects of a case embedded necessarily within a "political" context, as the United States had successfully argued was the Court's proper role in the *Iranian Hostages* case.<sup>5</sup>

But the real props were knocked out of the U.S. litigation stance by President Reagan's statement that until the Sandinista Government says "uncle," the goal of U.S. policy is directly that of removing the "present structure" of that Government.<sup>6</sup> The President's candor was matched by an unnamed senior State Department official directly involved with the Nicaragua program, as reported by Joel Brinkley in the *New York Times*.<sup>7</sup> According to this official, arms interdiction *never was* the goal of aid to the contras. That would have been, he said, "a fool's errand."<sup>8</sup> In short, the entire notion of collective self-defense, of aiding Nicaragua's neighbors against armed aggression by Nicaragua and of supporting the contras in Nicaragua so as to stop Nicaragua from exporting its revolution to other countries has melted away as a legal rationale for U.S. policy.

Is there any legal rationale left? What is the purpose of a "legal rationale" anyway? These are profound questions raised by the recent events of the *Nicaragua* case, and will undoubtedly occupy many students of international law for many years. At the risk of being absurdly premature, and with a plea in self-defense that my purpose is to stimulate

<sup>3</sup> Davis R. Robinson, Letter to the Editor in Chief, 79 AJIL 423 (1985).

<sup>4</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP., para. 95 (Judgment of Nov. 26).

<sup>5</sup> United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, para. 37 (Judgment of May 24).

<sup>6</sup> News Conference, *supra* note 1.

<sup>7</sup> Brinkley, *Vote on Nicaraguan Rebels: Either Way, a Turning Point*, N.Y. Times, Mar. 17, 1985, at A1, col. 5.

<sup>8</sup> *Id.* at 6, col. 3.

debate, let me proceed briefly to attempt to do injustice to these two questions.

#### THE LEGAL BASIS FOR THE U.S. POSITION

There is only one basis in general customary international law to support the actual position of the United States with respect to Nicaragua. It is *not* to be found in positivist state-based conceptions of international law such as intervention in Nicaragua's internal affairs, sovereignty, territorial integrity or political independence.<sup>9</sup> Nor is it to be found in Professor Michael Reisman's proffered test of maintaining minimum world order. Professor Reisman would use that test to justify military intervention in support of the "right of peoples to determine their own political destinies,"<sup>10</sup> but I see no evidence—much as I would wish to see some—to show that democratically elected governments contribute more to international stability and order than, say, Communist bloc countries. Professor Reisman's attempt to tie self-determination to world public order has no empirical basis; internal forms of government do not necessarily correlate with foreign military adventurism. Instead, if any support for the U.S. position exists, it is to be found in the law of human rights, which both predated and postdated the statist conceptions of border impermeability reflected in Article 2(4) of the UN Charter.<sup>11</sup>

If we take human rights seriously, we cannot insulate a government's actions toward its own citizens by an artificial sovereign boundary. Professor Reisman was correct in likening the UN Charter to a "Wild West" town in the 19th century when a sheriff arrives announcing that he will enforce the law and that citizens no longer need carry weapons or resort to personal force to protect their rights.<sup>12</sup> However, if it later becomes clear that the sheriff is utterly incapable of maintaining order, Professor Reisman concludes that "even the best of citizens" will no longer refrain from the techniques of self-help that prevailed before the sheriff's arrival. Professor Oscar Schachter took sharp issue with Reisman's position. He replied that "[a] community might allow the citizen a gun to defend himself and his household, but it would not follow that he could legitimately use the weapon to impose behavior (however good) on another house-

<sup>9</sup> This is how Nicaragua characterized the legal issues in its complaint. See Application Instituting Proceedings, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) (submitted by the Nicaraguan Government to the Court Apr. 9, 1984).

<sup>10</sup> Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AJIL 642, 643 (1984).

<sup>11</sup> For an expansion of the argument that human rights predated positivist conceptions reflected in the UN Charter, see D'Amato, *Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 AJIL 92, 101-04 (1985). For an expansion of the argument that the law of human rights postdates the Charter and stems from the impact of treaties upon customary law, see D'Amato, *The Concept of Human Rights in International Law* [hereinafter cited as *Human Rights*], 82 COLUM. L. REV. 1110 (1982).

<sup>12</sup> Reisman, *supra* note 10, at 643.

hold."<sup>13</sup> We do not have to imagine the Wild West to refute Professor Schachter; recent news accounts and congressional testimony regarding severe child abuse make it clearly realistic to consider forcibly breaking into a neighbor's house or apartment to stop a parent from thrashing a helpless child to within an inch of its life. Certainly, the state now takes the position that parents may not brutalize their own children. This same concern with the rights of helpless children in domestic law has its analogue in concern for the rights of citizens helpless against torture and murder by their own government. Governments have a monopoly of armed power in their states, and the horrible 20th-century examples of genocide attest vividly to the necessity of foreign intervention to prevent brutal governments from getting away with mass murder.

The three paradigmatic cases justifying humanitarian intervention are genocide, slavery and widespread torture.<sup>14</sup> At the other extreme are violations of human rights that have no basis in customary or conventional international law for justifying intervention because the evil they represent is minor in comparison to the evil of military intervention (and the loss of life that usually accompanies military intervention). For example, if a state expels a minority group, the refugees' human rights have certainly been violated (and other states inherit an immigration burden), but there is no present basis in customary law to change the government's expulsion policy by means of an armed attack. Yet, although both ends of the human rights spectrum are clear, how can we deal with cases in the middle?

The simple answer is that students of international law can only look at state practice and draw conclusions from it. The danger of resorting to military intervention with its attendant risk of touching off a war erects a clear presumption against any transboundary use of force. Only the grossest abuses of human rights by a government against its own citizens would overcome the burden against external interference. Yet customary law can change, and state practice may add a fourth paradigmatic case to the list. The U.S. intervention in Grenada, which toppled a new government that had just machine-gunned its way into power, and the present policy to remove the Sandinista regime in Nicaragua may be steps along the way toward a new rule of customary international law. Historically, it is not so new; the Grenada intervention, as I suggested at the time it occurred,<sup>15</sup> was the reincarnation of Wilsonianism.

What Woodrow Wilson and Ronald Reagan have in common is the conviction that it is better to intervene sooner, rather than later, in an effort to prevent a nondemocratic government from seizing the reins of power and then perpetuating itself by its monopoly of armed power against its own citizenry. Whether one agrees with this philosophy or not, it is indeed grounded in human rights. An undemocratic government,

<sup>13</sup> Schachter, *The Legality of Pro-Democratic Invasion*, 78 AJIL 645, 646 (1984).

<sup>14</sup> For a defense of this proposition, with citations to other writers, see D'Amato, *Human Rights*, *supra* note 11, at 1128-29.

<sup>15</sup> D'Amato, *Intervention in Grenada: Right or Wrong?*, N.Y. Times, Oct. 30, 1983, at E18, col. 3.

according to all empirical evidence of the last several centuries, is far more likely to commit basic human rights violations against its citizens than a democratic government. I argued above that there was no correlation between democratic government and minimum world public order, but I doubt that anyone could dispute the very strong correlation between democratic government and respect for the fundamental human rights of the citizenry. One has only to look at the egregious cases of genocide (Stalinist Russia, Nazi Germany, Cambodia, the "disappeared" persons of dictatorial Argentina) for the obvious evidence. Philosophically, the proposition is logically compelling. As John Locke, Thomas Jefferson and Jeremy Bentham demonstrated, a government that depends upon the consent of the governed—exercised not just once but in periodic intervals, with free opposition parties—is extremely unlikely to brutalize its own citizens. To be sure, Aristotle long ago pointed out the danger that popular governments may become tyrannical, and "eternal vigilance" is a constant price that citizens have to pay in democracies. Nevertheless, the proposition is unassailable, both logically and empirically, that democratic governments are far less likely to tyrannize and brutalize their own citizens than are unaccountable governments.

Whether the Sandinista Government of Nicaragua is on its way toward becoming a totalitarian government capable of tyrannizing its own citizens is certainly hard to tell at present. Its violations of the human rights of its own Miskito Indian citizens count heavily against it, but the atrocities committed by the contras against Nicaraguan citizens indicate that the opposition in Nicaragua may not present a moral alternative. Yet this is the question that is really at issue. How enlightened it would have been for the International Court of Justice to hear argument addressed to this question, rather than to the spurious ones that filled the voluminous documents presented to the Court by both parties!

Apart from the specific question of Nicaragua, the real test of the Reagan administration will be whether it is willing to apply its interventionist philosophy, as did Wilson, to right-wing as well as left-wing governments.<sup>16</sup> There is surely no difference between human rights violations committed by undemocratic governments of either the right or the left. If we are truly trying to create a world that respects the fundamental rights and dignity of the person and attempts to clear away the debris of Hegelian state-based claims of right, we should expect a new American foreign policy that is as antagonistic to dictators of the right as it is to the Sandinista Government of Nicaragua.<sup>17</sup>

<sup>16</sup> When visiting King Juan Carlos of Spain, President Reagan referred to the "undemocratic governments" in Latin America of Paraguay, Chile, Cuba and Nicaragua, a statement which lumped together authoritarian and totalitarian regimes. CBS-TV Evening News, May 7, 1985.

<sup>17</sup> For an expansion of the argument that the best form of national security for the United States in the foreseeable future is the security that comes from having its citizens travel and trade abroad in countries that are committed to respecting human rights, see D'Amato, *Are Human Rights Good for International Business?*, 1 NW. J. INT'L L. & BUS. 22 (1979).

"ACADEMIC" AND "REALIST" LEGAL RATIONALES

If the arguments on both sides that were made in *Nicaragua v. United States* were largely spurious, what is the point of international legal rationalization? It almost appears at times that governments invoke precisely those legal rationales in favor of their positions that they believe *academic* international lawyers want to hear. They may announce that they are following the X set of rules when the actions they take have a hidden agenda labeled Y; yet X is proclaimed because international legal scholars want to hear X and expect to hear X. By invoking the X set of rationales, governments appease the international legal community, which is one of many pressure groups governments attempt to accommodate by their verbal policies.

Not only do many international legal scholars accept these verbal rationalizations when they are made, but they also proclaim that it is important that governments invoke those rationales. If a government says X when it does Y, these scholars say that the government refrained from invoking Y because that would be tantamount to admitting a violation of international law. Hence, these scholars tell us, the government-invoked rules of international law (meaning set X) remain intact even though a government may have deviated from them in practice (in doing Y). Given this self-referential reinforcement of their own theories by scholars, one can hardly blame governments for going along with the game. One is reminded of La Rochefoucauld's observation, *L'hypocrisie est un hommage que le vice rend à la vertu*.

When the United States intervened in Grenada, an interesting spectacle was played out in the scholarly literature. The Government invoked the X set of rules in favor of its intervention, and academic critics also invoked the X set of rules to show that those rules, properly interpreted, proved instead that the U.S. intervention was illegal. But the real rationale, which in my opinion expressed at the time was a human rights-based reason for intervention (the Y set of rules),<sup>18</sup> was not invoked by either side. To be sure, the Reagan administration did invoke Y in its more public, less legal-sounding statements, but these were overlooked both by the academic critics and by State Department attorneys charged with justifying the U.S. action according to the traditionally accepted X set of rules. Similarly, in *Nicaragua v. United States*, parties and critics alike debated the X set of rules until, a month after the United States withdrew from the case, President Reagan told us that the real rationale was Y.

The difference between X and Y is no simple dichotomy between what governments say and what they do. Rather, there is a profound challenge to the theory of international customary law to take into account the real difference between X and Y. The rules I have called X are those that governments profess and proclaim to be following when they undertake particular actions or restraints in the international arena. These governmental *statements* typically comport with academic versions of what inter-

<sup>18</sup> D'Amato, *supra* note 15.



national law requires. On the other hand, the rules I have called *Y* are those that actually cohere with the actions or restraints of the acting government. In scientific terms, *Y* is the "theory" that has a "better fit" with the facts than does *X*. As Wittgenstein, following the Skolem-Lowenheim theory, demonstrated, no theory is uniquely determined by a given set of facts or experiments, but theories that can be called "explanatory" must be consistent with all the data. The reason that governments typically do not proclaim the *Y* theory is that academics expect them to proclaim the *X* theory and would charge that the *Y* theory would be a governmental admission of violation of international law. But these are simply academic, or at best strategic, considerations; in fact, unbiased reasonable observers would agree that the operative theory is *Y*.

The insistence on what governments *say*, and an unwillingness to face up to the difficult task of inferring what they should have said from the facts of what they did, reached an apotheosis of sorts in an article by Dr. Michael Akehurst on customary international law.<sup>19</sup> The article, which has been widely cited, comes close to urging us to ignore totally what governments do and instead rely exclusively on what they *say*. Governmental *statements*, and not their actions (and the rules inferable from them), constitute what Dr. Akehurst calls custom. I have attempted to criticize the specifics of his approach elsewhere;<sup>20</sup> here I mention it as a prominent illustration of the academic impulse to keep *X* as the set of rules regardless of what goes on in the real world. If Dr. Akehurst and the many who follow him have their way, their books will never be out of date because they proclaim and set forth unchanging legal principles to which governments, regardless of what they actually do, pay lip service.

Instead, I would argue that customary law grows and changes over time as a result of the interactions of states in the international arena (the facts) and the rules we may infer from those interactions as the theory that best fits what the states did (even if it was not, or was only partly, what they said they were doing). It is surely harder to do this kind of international law research than to follow Dr. Akehurst and simply take governmental statements at face value. For what I am suggesting requires research into the *history* of governmental interactions, the *facts* that occurred, the *settlements* that were reached, the *agreements* that were entered into. At the same time, the researcher should be highly skeptical about the negotiating positions taken by the governments involved, their unilateral proclamations, the briefs they file in a court or arbitral tribunal, the opinions of their attorneys general or their foreign offices. The researcher should also be skeptical of *protests* by one government to another; the filing of a protest does not mean that the protesting government means or believes what it says.<sup>21</sup> And skepticism is also a good antidote to the all-too-easy tendency

<sup>19</sup> Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-75).

<sup>20</sup> D'Amato, *Human Rights*, *supra* note 11, at 1135-47.

<sup>21</sup> Indeed, protest may have the counterproductive effect of articulating the very norm that the protesting government objects to. See A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 101-02 (1971).



to view General Assembly resolutions, or Security Council condemnations of state actions, as expressive of international rules of law.<sup>22</sup> Sometimes a Security Council condemnation that is not followed by any forcible action on the part of the Council is another way of saying to the ostensibly offending state, "We have to condemn you verbally, but don't worry, we're not going to do anything about it."<sup>23</sup> In such cases, the lack of action by the Security Council may be a more eloquent way of approving the Y set of rules than its verbal recommendation reciting the X set.

The truly operative rules generated by the customary practice of states, which I have labeled the Y set, are the rules that in reality accommodate the most deeply felt interests of the community of states. If concern for human rights is one of those deeply felt interests, that concern will be manifested in the emerging rules of custom even if those new rules are at variance with received wisdom. As Professor Thomas Franck has shown, new rules inferable from the practice of states have gone a long way toward undermining Article 2(4) of the Charter.<sup>24</sup> The Grenada and Nicaragua examples, as well as the Israeli raid upon the Iraqi nuclear reactor, add additional evidence to Professor Franck's thesis. The challenge to the international legal scholar is to dig beneath the verbiage, to peel off the ritual invocations of traditional rules in governmental press releases and to articulate the operative emerging rules of customary law. It is an exciting challenge because it is grounded in scientific objectivity and candor.

ANTHONY D'AMATO

## REFORM OF LAWMAKING IN THE UNITED NATIONS: THE HUMAN RIGHTS INSTANCE

### I. INTRODUCTION

The extent of the human rights lawmaking in the United Nations has been impressive, in terms of the quantity of both its output and the organs involved. Lawmaking, as a process by which organs of the United Nations adopt international human rights instruments, has naturally attracted the critical attention of governments and of scholars, for whom such processes have always held a special fascination. Recent studies have drawn attention to this process in the United Nations in general, and in the human rights area in particular.<sup>1</sup> They point to deficiencies in both the process and the quality of the instruments that have been adopted. These deficiencies are

<sup>22</sup> See B. WESTON, R. FALK & A. D'AMATO, *INTERNATIONAL LAW AND WORLD ORDER* 96-101, 102-05 (1980).

<sup>23</sup> I have previously argued that this may have been the Security Council's attitude when it condemned Israel for its aerial attack upon the Iraqi nuclear reactor. See D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AJIL 584, 586 (1983).

<sup>24</sup> Franck, *Who Killed Article 2(4)?*, 64 AJIL 809 (1970).

<sup>1</sup> Schachter, *The Nature and Process of Legal Development in International Society*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 745 (R. Macdonald & D. Johnston eds.

not always rooted in political factors, but often in incompetence, hasty consideration and approval, and lack of adequate research and editing. Therefore, they must not be viewed as inevitable and beyond reasonable prospects for reform. The important volume of essays on the International Covenant on Civil and Political Rights edited by Professor Henkin contains many examples of poorly drafted provisions, and worse, provisions that conflict with each other.<sup>2</sup> It is not unusual to find that provisions drafted during a later session of the lawmaking organ conflict with those drafted earlier, and that no attempt was made subsequently to revise the conflicting texts.

Some of the unfortunate language involved in one of the major human rights instruments, the Convention on the Elimination of All Forms of Racial Discrimination, was discussed in a recent article.<sup>3</sup> Other instruments, e.g., the Convention on the Elimination of All Forms of Discrimination Against Women, pose equal or even greater problems, as demonstrated in an unusually candid memorandum of law by the Department of State.<sup>4</sup>

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1983); Sohn, *The Shaping of International Law*, 8 GA. J. INT'L & COMP. L. 1 (1978); Suy, *Innovations in International Law-Making Processes*, in THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE 187 (R. Macdonald, D. Johnston & G. Morris eds. 1978); Szasz, *Improving the International Legislative Process*, 9 GA. J. INT'L & COMP. L. 519 (1979); M. EL BARADEI, T. FRANCK & R. TRACHTENBERG, THE INTERNATIONAL LAW COMMISSION: THE NEED FOR A NEW DIRECTION (UNITAR Policy and Efficacy Studies No. 1, 1981), summarized in 76 AJIL 630 (1982); REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS, UN Doc. ST/LEG/SER.B/21 (prov. ed. 1982) [hereinafter cited as REVIEW]; Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AJIL 607 (1984); Ramcharan, *Standard-Setting: Future Perspectives*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 93 (B. Ramcharan ed. 1979); Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AJIL 754 (1982). On codification of international law in general, see Rosenne, *Codification of International Law*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 34 (Instalment 7, R. Bernhardt ed. 1984), and bibliography, *id.* at 41.

<sup>2</sup> See, e.g., Cassese, *The Self-Determination of Peoples*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 103-05 (L. Henkin ed. 1981); Ramcharan, *Equality and Nondiscrimination*, in *id.* at 246, 251, 256-57.

<sup>3</sup> Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AJIL 283 (1985).

<sup>4</sup> CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY ON DECEMBER 18, 1979, AND SIGNED ON BEHALF OF THE UNITED STATES OF AMERICA ON JULY 17, 1980, S. EXEC. R. 96th Cong., 2d Sess. (1980).

In addition to many substantive difficulties, there is a serious inconsistency between the duty of the Committee on the Elimination of Discrimination Against Women, under Article 21, to examine the reports submitted by states parties under Article 18, and the language of Article 20, which states that "[t]he Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention." Since by January 1985, 65 states were parties to the Convention and the Committee has been considering six reports in every one of its sessions, one member of the Committee has observed that, at this pace, "the discussion of all reports would be completed by the year 2000." UN Doc. CEDAW/C/1985/L.1, para. 29.

Inconsistencies and the potential for conflict between norms contained in different instruments have been observed.<sup>5</sup> My own recent investigation of normative relationships between human rights instruments, now under preparation for publication, reveals that conflicts between such instruments are not mere *hypothèses d'école*, but are real and immediate.

UN Secretariat studies have noted the lack of structure in human rights lawmaking processes<sup>6</sup> and unhappiness with the present situation has been voiced openly by governments. The Government of the United States thus observed in the Third (Social, Humanitarian and Cultural Questions) Committee that

much of the work in this area proceeds without planning, in a kind of haphazard manner, at a desultory pace and with overlapping jurisdictions. We have working groups in the Third Committee, in the Commission on Human Rights, and in the Subcommission. It is difficult to keep track of the different drafts. There is a lack of continuity and expertise among the persons working on the drafts. It makes no sense, for example, for a body of this size to attempt to draft a convention from its inception. As it is, one often has to reinvent the wheel each time a working group reconvenes. The result is neither fast nor fruitful.<sup>7</sup>

The problem, however, cannot be attributed merely to a lack of coordination or of cost efficiency in the system; it also derives from the quality of the instruments themselves and has far-reaching impact on prospects for acceptance by states, respect for the norms stated and their interpretation. As the Government of Spain observed in the general context of UN treaty making, politicization of the negotiating process and inadequate preparation of the relevant texts help to explain "the legal inadequacies of many of the treaties adopted recently, a situation which in turn creates major problems in terms of the interpretation and application of such treaties."<sup>8</sup>

A fresh look at the lawmaking structure of the United Nations is therefore needed. The recent beginning by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) of the examination of its role and its relationship with the

<sup>5</sup> See Meron, *supra* note 1, at 756-64.

<sup>6</sup> 1 REVIEW, *supra* note 1, at 12.

<sup>7</sup> Verbatim text of remarks by Jerome J. Shestack (Nov. 13, 1980), summarized in UN Doc. A/C.3/35/SR.56, at 12-14 (1980).

<sup>8</sup> 1 REVIEW, *supra* note 1, at 43.

Scholars have complained about the high degree of abstraction and generality in which international human rights instruments have been drafted and which makes their application in specific cases difficult. Lillich, *Civil Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 121 (T. Meron ed. 1984); Greenberg, *Race, Sex, and Religious Discrimination in International Law*, in 2 *id.* at 307, 318, 330.

Abstraction helps, however, in many cases to attain the necessary consensus. In national laws and constitutions, highly abstract provisions are clarified through practice and jurisprudence. In international human rights, the process of creating interpretative jurisprudence is slow in time and incomprehensive in scope. This makes good drafting essential.

Commission on Human Rights (the Commission) makes this inquiry particularly timely.

## II. THE PRESENT STRUCTURE OF UN HUMAN RIGHTS LAWMAKING

In the United Nations, lawmaking in the human rights area is carried out by the General Assembly, the Economic and Social Council (ECOSOC) and the many subsidiary organs of these two principal organs, including the functional commissions of ECOSOC. The key provisions on human rights lawmaking are found in Articles 13 and 62 of the Charter of the United Nations, which suggest that the lawmaking powers of the General Assembly and ECOSOC are largely concurrent or shared, and, as regards the relationship between the General Assembly and ECOSOC, in Article 60. Although both the General Assembly and ECOSOC are mentioned in Article 7 as among the principal organs of the United Nations, ECOSOC's position is subordinate to that of the General Assembly.<sup>9</sup> The Charter empowers the General Assembly to exercise blanket authority over the lawmaking activities of the United Nations, but this power either has not been exercised or has not been exercised effectively. Rather than creating an effective infrastructure to carry out their lawmaking responsibilities, both the General Assembly, under Article 22 of the Charter, and ECOSOC, under Article 68, have established a plethora of standing and ad hoc bodies and entrusted them with the performance of human rights functions, including "legislative" activities.

Among those bodies, the Commission and the Sub-Commission enjoy particular importance in human rights lawmaking. The terms of reference of the Commission,<sup>10</sup> as approved by ECOSOC in Resolution 5 (I) and amended by Resolution 9 (II), encompass the preparation of lawmaking human rights instruments. By Resolution 9 (II), ECOSOC authorized the Commission to call in ad hoc working groups of nongovernmental experts in specialized fields or individual experts, without further reference to the Council but with the approval of the Council's President and the Secretary-General.<sup>11</sup> While the Commission generally executes the directives of ECOSOC,<sup>12</sup> on many occasions the General Assembly has addressed requests directly to the Commission, rather than through the Council.<sup>13</sup> The Commission has been involved in the drafting of many human rights instruments. It is composed of 43 representatives of UN member states elected by ECOSOC on the basis of equitable geographical distribution.

<sup>9</sup> See generally J. RENNIGER, ECOSOC: OPTIONS FOR REFORM 4 (UNITAR Policy and Efficacy Studies No. 4, 1981).

<sup>10</sup> L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 739-40 (1973).

<sup>11</sup> UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS, UN Doc. ST/HR/2/Rev.1, at 273 (1980).

<sup>12</sup> L. SOHN & T. BUERGENTHAL, *supra* note 10, at 740.

<sup>13</sup> UNITED NATIONS ACTION, *supra* note 11, at 274 n.14. For an example of such a resolution, see GA Res. 37/180, 37 UN GAOR Supp. (No. 51) at 202, UN Doc. A/37/51 (1982).

ECOSOC resolutions provide that the Secretary-General shall consult with governments selected to serve on the Commission before the representatives are finally nominated by their governments and confirmed by the Council.<sup>14</sup> The consultation with the Secretary-General, however, is routine.

The original terms of reference of the Sub-Commission, as clarified and extended by the Commission in 1949,<sup>15</sup> do not explicitly mention lawmaking. Yet both the Commission and ECOSOC may entrust the Sub-Commission with lawmaking functions by specific resolutions. On many occasions the Commission has called on the Sub-Commission to prepare drafts of human rights instruments. The Sub-Commission is composed of 26 members (and their alternates), who are elected by the Commission as individuals and not as representatives of states. Their selection is made in consultation with the Secretary-General and was originally subject to the consent of the governments of the states of which they were nationals.<sup>16</sup> The latter requirement is now obsolete, however, since ECOSOC Resolution 1334 (XLIV) of May 31, 1968 provides for the nomination of experts by their governments.<sup>17</sup>

The Commission and Sub-Commission perform other functions in addition to lawmaking, such as the preparation of studies and programs, and the consideration of violations. Thus, only part of their time, usually a small part, is devoted to lawmaking.<sup>18</sup> Both bodies devote the major portion of their time to studying particular violations of human rights and situations prevailing in countries accused of infringing human rights. However, the preponderance of studies of human rights violations over lawmaking does not appear to reflect a deliberate decision that, at the present stage of development of the law, the former are more important than the latter;<sup>19</sup> rather, it is explained by their greater urgency, as well as by the time constraints on the Commission. Although the international community may have passed the zenith of its lawmaking activity, at least insofar as broadly oriented global instruments focusing on civil and political rights are concerned,<sup>20</sup> work on such subjects as, among others, rights of the child is continuing<sup>21</sup> and new subjects are coming to the fore,

<sup>14</sup> L. SOHN & T. BUERGENTHAL, *supra* note 10, at 740.

<sup>15</sup> *Id.* at 744.

<sup>16</sup> UNITED NATIONS ACTION, *supra* note 11, at 276. On the Sub-Commission, see generally Haver, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 21 COLUM. J. TRANSNAT'L L. 103 (1982); Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AJIL 869 (1968).

<sup>17</sup> See, e.g., UN Doc. E/CN.4/1984/47 and Adds. 1-7; UN Doc. E/CN.4/1985/SR.37, para. 3.

<sup>18</sup> Tolley, *Decision-Making at the United Nations Commission on Human Rights, 1979-82*, 5 HUM. RTS. Q. 27, 43 (1983).

<sup>19</sup> For a discussion of the several historical stages in the work of the Commission, see Schwelb & Alston, *The Principal Institutions and Other Bodies Founded under the Charter*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 231, 250-51 (K. Vasak ed., P. Alston Eng. ed. 1982).

<sup>20</sup> Meron, *supra* note 1, at 771-72.

<sup>21</sup> UN Doc. E/CN.4/1984/71.

especially in the economic and social fields. The need for disciplined and informed lawmaking is thus as great as ever.

In addition to "standard setting," the Sub-Commission deals with various studies, considers gross violations of human rights in accordance with Resolution 8 (XXIII) of the Commission and ECOSOC Resolution 1235 (XXLII), and handles communications under the procedure established by ECOSOC Resolution 1503 (XLVIII). The Sub-Commission sends missions to various areas in which human rights are threatened. It adopts "rather hurriedly a large number of resolutions,"<sup>22</sup> particularly on the situation in countries where gross violations of human rights are occurring. Because so much of the Sub-Commission's work is related neither to discrimination nor to protection of minorities, it has been suggested that its name be changed to "Committee of Experts on Human Rights."<sup>23</sup>

A perusal of the documents of the Sub-Commission, including the annotated agenda for its 1984 session,<sup>24</sup> and my own observation of the Sub-Commission's work during that session reveal that little time and little priority are given to its lawmaking role. With the encouragement of the Commission, the Sub-Commission is now reviewing its role, decision-making processes, agenda, rationalization of work and relationship with the Commission.<sup>25</sup> In acknowledgment of the low priority now accorded to lawmaking, suggestions "that the drafting of norms should be one of its priorities"<sup>26</sup> have been advanced. In a candid and thoughtful statement before the Working Group on the Review of the Work of the Sub-Commission, Dr. Kurt Herndl, the Assistant Secretary-General for Human Rights, argued the need to consider the Sub-Commission's methods of preparing standards:

In the earlier years of the Sub-Commission standards were prepared with much deliberation. They usually were a direct follow-up to a study and were often based on the study's conclusions. Nowadays, draft standards may be proposed by one or more individual members of the Sub-Commission, appended to a resolution, sometimes discussed by a working group, and then sent by the Sub-Commission to the Commission. Would there not seem to be some need for better procedures and organization in this area . . . ?<sup>27</sup>

Dr. Herndl also called for rationalization of the Sub-Commission's proce-

<sup>22</sup> UN Doc. E/CN.4/Sub.2/1984/2, at 4.

<sup>23</sup> *Id.* at 3.

<sup>24</sup> UN Doc. E/CN.4/Sub.2/1984/1/Add.1. See also Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Thirty-seventh Session, UN Doc. E/CN.4/1985/3, E/CN.4/Sub.2/1984/43 (1984).

<sup>25</sup> UN Doc. E/CN.4/1985/3, E/CN.4/Sub.2/1984/43, at 23-25. See also UN Docs. E/CN.4/Sub.2/1984/2 and E/CN.4/Sub.2/1984/3.

<sup>26</sup> UN Doc. E/CN.4/Sub.2/1984/2, at 3-4. See also Garber & O'Connor, *The 1984 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 79 AJIL 168, 178 (1985).

<sup>27</sup> Verbatim text (Aug. 8, 1984), summarized in UN Doc. E/CN.4/Sub.2/1984/SR.5, at 7.

ture for selecting and preparing studies, a matter of importance in the present context since studies frequently lead to lawmaking projects.

The quality of the members of the Commission and Sub-Commission is a significant factor in the success or lack of success of their work. Alluding to the practice of many governments of designating as their representatives on the Commission persons possessing special competence in human rights, the United States Government observed, correctly, that "such representatives have been able to make the most significant contributions to the Commission's work."<sup>28</sup> Clearly, the fact that the Commission initially had as members persons of the caliber of René Cassin and Eleanor Roosevelt is an important reason for the speedy adoption of a truly remarkable instrument: the Universal Declaration of Human Rights. But the overall experience with regard to the quality of representatives on the Commission is not reassuring, since some states appoint representatives who lack the necessary expertise and standing.<sup>29</sup> The Commission is not only a political organ, composed of representatives of states, but also a politicized one. The Sub-Commission, of course, is composed of experts, but their quality is uneven.<sup>30</sup> There is some evidence of its growing politicization as well.<sup>31</sup>

One should not lose sight of the fact that human rights lawmaking is also carried out outside the Commission and the Sub-Commission. Thus, the important Convention on the Elimination of All Forms of Discrimination Against Women<sup>32</sup> was elaborated largely by the Commission on the Status of Women, another functional commission of ECOSOC, composed of 32 representatives of member states.<sup>33</sup>

<sup>28</sup> 1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 439 (1980).

<sup>29</sup> Biographical data of representatives to the Commission are available in the Office of Secretariat Services for Economic and Social Matters of the UN Secretariat but are not circulated as UN documents. UN Doc. E/1983/5.

Referring to some distinguished members of the Commission in its early years, Tolley has observed that "[t]he calibre and effectiveness of Commission members vary not only among delegations but also over time." *Supra* note 18, at 34.

<sup>30</sup> For biographical data of candidates nominated by governments and submitted by them, see UN Doc. E/CN.4/1984/47 and Add. 1-7.

<sup>31</sup> See, e.g., UN Docs. E/CN.4/Sub.2/1984/2, at 3, and E/CN.4/Sub.2/1984/3, at 3. The Chairman of the Sub-Commission acknowledged the relevance of the issue of the independence of the members of the Sub-Commission:

One must be careful to stress that independence, since there was no escaping the fact that members were nominated by Governments and were exposed, as were the members of the Commission to many different pressures, not only from their own Governments but from others and from non-governmental and other organizations.

UN Doc. E/CN.4/1985/SR.37, para. 3. Austria called for the strengthening of the expert character of the Sub-Commission and "the depoliticization of its work." UN Doc. E/CN.4/1985/SR.35. In Res. 1985/28, on the "Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Thirty-seventh session," the Commission stressed that states should "nominate as members and alternates persons meeting the criteria of independent experts, not subject to Government instructions in the performance of their functions as members of the Sub-Commission." UN Doc. E/CN.4/1985/L.11/Add.2, at 20, para. 4. See also Garber & O'Connor, *supra* note 26, at 173-79.

<sup>32</sup> GA Res. 34/180, 34 GAOR Supp. (No. 46) at 193, UN Doc. A/34/46 (1979).

<sup>33</sup> UNITED NATIONS ACTION, *supra* note 11, at 96-98, 278; L. SOHN & T. BUEGENTHAL, *supra* note 10, at 526.



Some lawmaking projects are undertaken by the General Assembly itself without any serious preparatory work by more expert organs. For example, the new UN Convention on the Protection of the Rights of All Migrant Workers and Their Families<sup>34</sup> is being drafted by the General Assembly despite the greater expertise and considerable achievements of the International Labour Organisation (ILO) in this area.<sup>35</sup> Such work is carried out at the United Nations by an open-ended working group of delegates to the General Assembly; the process exemplifies the drafting of human rights instruments by generalists, rather than by experts. Through another open-ended working group, the General Assembly is also considering the elaboration of a declaration on the human rights of individuals who are not citizens of the country in which they live.<sup>36</sup>

It should not be assumed, however, that a generalist governmental representative is necessarily incompetent. Talented academics, parliamentarians, lawyers and members of women's organizations, among others, have served on the Third Committee and other organs composed of representatives of governments; but this is not enough to guarantee the necessary "legislative" skill when the initial draft is not prepared by experts. While national lawmakers may not always be well qualified, they are usually assisted by governmental and legislative experts and function in a more structured setting. Although the General Assembly often performs elaborate and complex drafting functions, such an organ is not well equipped to prepare a good text on the basis of many, sometimes conflicting proposals. For the most part, the General Assembly can effectively deal with the adoption of multilateral instruments if the draft does not require much additional revision or negotiation before its adoption. Some topics, however, because of their highly political content, may require a greater degree of involvement by governments throughout the lawmaking process. In such cases, it might be necessary to call upon the General Assembly, which is an appropriate body for negotiation and the formation of a consensus. While conferences of plenipotentiaries may also be hampered by the difficulty inherent in a broad membership, their rules of procedure, working methods and available time appear to be better suited to lawmaking than those of main committees of the General Assembly.<sup>37</sup>

Of course, the contents of the instruments reflect the parameters of political consensus. But the technical quality of the instruments often falls short even of the reach of political consensus (where there have been deficient drafting, inconsistencies as between different provisions of the same instrument, gaps, overlap or conflicts between instruments).<sup>38</sup> Problems of particular concern are the frequent lack of adequate research

<sup>34</sup> See UN Docs. A/C.3/38/WG.1/CRP.2/Rev.1 (1983); A/C.3/38/1 (1983); A/C.3/38/5 (1983); A/C.3/39/1 (1984); A/C.3/39/4 (1984).

<sup>35</sup> See Meron, *supra* note 1, at 760 & n.39.

<sup>36</sup> GA Res. 37/169, 37 UN GAOR Supp. (No. 51) at 196, UN Doc. A/37/51 (1982); GA Res. 38/87, UN Doc. A/RES/38/87 (1983); UN Doc. A/C.3/39/9 and Corr.1 (1984).

<sup>37</sup> See 1 REVIEW, *supra* note 1, at 112 (remarks by Austria).

<sup>38</sup> See generally Meron, *supra* note 1.

prior to the decision to initiate the lawmaking process and inadequate supporting research throughout that process. However, these problems are not limited to human rights. The Legal Counsel of the United Nations has complained that the time left to the Secretariat for study and research in the codification and progressive development of international law "has dwindled almost to a vanishing point."<sup>39</sup>

Whether there is a need for an instrument and what form this instrument should take, i.e., a treaty or a declaration, are often insufficiently considered. Texts are frequently drawn up by representative organs with a large membership, without the benefit of a carefully formulated initial draft prepared by experts. There is inadequate resort to special rapporteurs, drafting committees and expert working groups. The process suffers from lack of direction and structure. Authority is dispersed among many bodies. While several organs are involved in the drafting of human rights instruments, not a single organ is engaged exclusively in lawmaking. Organs that specialize in human rights devote the bulk of their time to "non-legislative" work. The center of gravity of the Sub-Commission as well as of the Commission has shifted from lawmaking to other activities, especially the consideration of gross violations of human rights.

### III. ALTERNATIVE LAWMAKING MODELS

In considering possible reforms of lawmaking in the human rights field, it may be worthwhile to take a brief look at some other models of lawmaking. In the United Nations, three areas are particularly instructive: outer space treaties, international trade law and the general lawmaking activities of the International Law Commission.

For the preparation of treaties regulating activities in outer space,<sup>40</sup> a structured procedure has been developed by the Committee on the Peaceful Uses of Outer Space<sup>41</sup> and its Legal Sub-Committee. This process is characterized by the successive consideration of texts by a working group of the Legal Sub-Committee, the Legal Sub-Committee itself and the committee, all of which are composed of members from the same 53 states, and finally by a main committee of the General Assembly (at present, the Special Political Committee). The report of each organ to the next senior one records problems and progress.<sup>42</sup> The treaty is eventually adopted and opened for signature by the General Assembly. In the drafting process, the working group is sometimes assisted by a drafting committee, as is the committee itself when completing preparation of a particular text.

The procedures of the United Nations Commission on International Trade Law (UNCITRAL) are regular and relatively structured.<sup>43</sup> The

<sup>39</sup> Suy, *supra* note 1, at 196.

<sup>40</sup> 2 REVIEW, *supra* note 1, at 137.

<sup>41</sup> For the committee's initial mandate, see GA Res. 1348, 12 UN GAOR Supp. (No. 18) at 5, UN Doc. A/4090 (1958).

<sup>42</sup> 1 REVIEW, *supra* note 1, at 12.

<sup>43</sup> For UNCITRAL's initial mandate, see GA Res. 2205, 21 UN GAOR Supp. (No. 16) at 99, UN Doc. A/6316 (1966).

usual practice is to request the Secretariat to prepare studies on the issues pertaining to the adoption of a proposed convention. UNCITRAL has adopted the salutary policy of referring a subject matter to a working group only "after preparatory studies . . . [have] been made by the Secretariat and the consideration of these studies by the Commission . . . [have] indicated not only that the subject-matter . . . [is] a suitable one in the context of the unification and harmonization of a law, but that the preparatory work . . . [is] sufficiently advanced."<sup>44</sup>

When UNCITRAL decides that a particular subject merits further study, possibly with a view to the preparation of a treaty, it assigns the subject to a working group. While UNCITRAL is composed of representatives of 36 governments, not of experts elected in their individual capacities, states are encouraged to send representatives who are experts in the field to each working group. Working groups are central to UNCITRAL's functioning. They benefit from the constant input of research by the Secretariat and comments by governments. The Secretariat's background studies analyze various questions, as requested by the working group, examine the existing law, highlight problems and suggest ways of harmonizing or unifying the law. They often contain draft provisions intended to facilitate the efforts of the working group. At various stages of the working group's endeavors, the Secretariat circulates questionnaires to all states and interested organizations soliciting comments and suggestions for consideration by the working group. In addition, working groups establish drafting committees to recommend the text of the draft provisions and their place in the draft treaty.

When the draft treaty reaches an advanced stage, the working group often requests the Secretariat to prepare an explanatory memorandum on the draft treaty, which is intended to aid the working group but not to constitute an official commentary. A careful editorial review is undertaken and a final text is prepared for submission to UNCITRAL. The draft text as approved by the working group is circulated to governments and interested organizations, together with a commentary. At the final stages, it is considered by UNCITRAL with the assistance of a drafting committee. The revised text is submitted by UNCITRAL to the General Assembly with the recommendation that a diplomatic conference be convened to adopt the draft convention.<sup>45</sup>

Lawmaking by the International Law Commission (ILC), a body of 34 experts elected by the General Assembly upon nomination by governments,<sup>46</sup> is characterized by the recourse to one expert for the basic preparatory work through the use of a special rapporteur, the subsequent careful scrutiny of the successive drafts, the progressive and gradual

<sup>44</sup> 2 REVIEW, *supra* note 1, at 227.

<sup>45</sup> *Id.* at 224-32; 1 *id.* at 11.

<sup>46</sup> 2 *id.* at 173-223. For the Statute of the ILC, see UN Doc. A/CN.4/4/Rev.2 (1982). The initial terms of reference of the ILC are contained in GA Res. 174 (II), UN Doc. A/519, at 105 (1947). They have been amended on several occasions by other resolutions. The amended terms of reference are contained in UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 103 (3d ed. 1980).

elaboration of texts with constant input from governments and organizations until the texts are ready for adoption, and the careful recording of the preparatory work, which is crucial to the proper study of the legislative histories and interpretation of the text.

Normally, the principal stages in the ILC's work are: the appointment of a special rapporteur; the preparation of a special report or series of reports (which contain analyses, draft articles and commentaries); the consideration of these reports by the ILC at several readings; the formulation and emendation of texts by drafting committees, which play a central role; the assignment of various tasks to the Secretariat; the input of governmental comments on the evolving texts, through written observations and debate in the Sixth Committee of the General Assembly; and the convening by the General Assembly of a diplomatic conference that would use the articles adopted by the ILC as the basis for discussion,<sup>47</sup> or the adoption of the articles by the Assembly itself.

When the ILC submits final articles on a given subject to the General Assembly, it also submits a commentary on them and a recommendation on whether they should form the basis of a convention. The General Assembly is thus called upon to decide whether or not such a convention should be concluded, and, if so, what organ should be entrusted with the task.<sup>48</sup> The General Assembly, through the Sixth (Legal) Committee, has adopted several conventions on the basis of articles adopted by the ILC, but far more have been adopted by conferences convened by the Assembly.<sup>49</sup>

The primary reasons for the success of the ILC drafts lie in the procedure followed and, as one commentary has suggested, in the independent expert character as well as in the superior scholarship of its members.<sup>50</sup> The fact that the ILC has included some of the leading international lawyers and has benefited from the services of several outstanding special rapporteurs has helped to build up support for the drafts it has prepared. "Negotiations between states which were based on a draft prepared by the Commission have been . . . more successful than those which began without a first draft, or where the first draft was negotiated by state representatives."<sup>51</sup>

Outside the United Nations, the ILO procedure for the adoption of conventions and recommendations by the International Labour Conference deserves interest because of its proven effectiveness and highly structured character.<sup>52</sup> Although this procedure is rooted in the statutory provisions

<sup>47</sup> 1 REVIEW, *supra* note 1, at 3.

<sup>48</sup> 2 *id.* at 202.

<sup>49</sup> *Id.* at 205-10.

<sup>50</sup> This is not to suggest that the work of the ILC has been above criticism. For a recent critical appraisal of its work and role, see M. EL BARADEI, T. FRANCK & R. TRACHTENBERG, *supra* note 1.

<sup>51</sup> *Id.* at 22.

<sup>52</sup> See generally 2 REVIEW, *supra* note 1, at 237-40; 1 *id.* at 14-15. On lawmaking in the ILO, see also ILO Doc. GB.228/4/2 (1984); INTERNATIONAL LABOUR OFFICE, INTERNATIONAL LABOUR STANDARDS (1984).

Outside the United Nations, the specialized agencies and regional organizations, the

of the ILO<sup>53</sup> and in its tripartite character, there is no reason why some of its features could not inspire appropriate reforms in UN human rights lawmaking.

The lawmaking experience of the Council of Europe, which is characterized by the formulation of draft texts by small committees of governmental experts with the assistance of the secretariat, also merits attention.<sup>54</sup> The Council of Europe has taken a methodical approach towards carefully expanding the political and civil rights stated in the European Convention for the Protection of Human Rights and Fundamental Freedoms by a series of protocols, of which Protocols Nos. 6,<sup>55</sup> 7<sup>56</sup> and 8<sup>57</sup> are the most recent. Through this process, some important protections, including those inspired by several substantive provisions of the International Covenant on Civil and Political Rights, have been incorporated in the additional protocols. The Council of Europe has encountered greater difficulties,

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lawmaking techniques employed by the International Committee of the Red Cross (ICRC) in the preparation of draft Geneva conventions and protocols for the protection of victims of war are of interest. They are characterized by the consultation of private experts followed, when the results warrant, by the consultation of governmental experts. Drafts prepared by the ICRC are revised in meetings with governmental experts and eventually submitted for approval to a diplomatic conference convened by the Swiss Government, as the depositary of the four Geneva Conventions of 12 August 1949 for the Protection of Victims of War. 2 REVIEW, *supra* note 1, at 364-83. The ICRC has published comprehensive commentaries on each of these Conventions but not, so far, on the two Protocols Additional to the Geneva Conventions of 12 August 1949, which were opened for signature on Dec. 12, 1977.

<sup>53</sup> INTERNATIONAL LABOUR ORGANISATION CONST. arts. 19-23; *see* pt. II, sec. E (Convention and Recommendation Procedure) of the Standing Orders of the International Labour Conference, INTERNATIONAL LABOUR OFFICE [hereinafter cited as ILO], CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION AND STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE 13-17, 48 (1982); *see also* Convention (No. 144) concerning Tripartite Consultations to Promote the Implementation of International Labour Standards, in ILO, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1981, at 198 (1982).

<sup>54</sup> 1 REVIEW, *supra* note 1, at 84. An important example of such a committee is the Committee of Experts for the Extension of the Rights Embodied in the European Convention on Human Rights.

<sup>55</sup> Council of Europe Doc. H (83) 3 (1983). On extension of rights in the Council of Europe in general, *see also* Council of Europe Doc. H/ONG (82) 3; Parliamentary Assembly of the Council of Europe, Recommendation 838 (1978), on widening the scope of the European Convention on Human Rights; Parliamentary Assembly of the Council of Europe, Recommendation 839 (1978), on the revision of the European Social Charter; Reply from the Committee of Ministers to Recommendation No. 838 (1978), Council of Europe Doc. H./Inf.(79)4, App.III, at 21 (1979); Report of the Committee of Experts on Human Rights to the Committee of Ministers on Problems Arising from the Co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, Council of Europe Doc. H (70) 7 (1970); COUNCIL OF EUROPE, DIRECTORATE OF HUMAN RIGHTS, PROCEEDINGS OF THE COLLOQUY ABOUT THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN RELATION TO OTHER INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS, ATHENS, 21-22 SEPTEMBER 1978 (1979).

<sup>56</sup> Council of Europe Doc. H (84) 5 (1984).

<sup>57</sup> Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 19, 1985 (Council of Europe prov. ed.), is aimed mainly at avoiding delays in proceedings under the European Convention.

however, in trying to identify economic, social and cultural rights that might be included in another additional protocol to the European Convention. The United Nations should emulate the example of the Council of Europe and regard the task of human rights lawmaking not as an operation designed to produce a particular instrument, but as a continuing process, which includes extension, elaboration, consolidation and revision. The work begun on the possible elaboration of a Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty<sup>58</sup> points in the right direction.

#### IV. PROPOSED REFORMS

To rationalize the adoption of so-called new rights, Philip Alston has recently proposed a set of procedures involving the Secretariat, the General Assembly and the Commission.<sup>59</sup> Such procedures would indeed be useful and could also be applied to rights not regarded as new. It is far from certain, however, that the General Assembly would have the necessary incentive to adopt such procedures. It is even more doubtful whether the General Assembly and other organs would have the self-discipline to follow such a procedure as long as the existing framework for human rights lawmaking is not modified. Procedures operate best when they are tied to institutional arrangements, as in the area of outer space law or international trade law where lawmaking organs have been established.

What is needed is an organ that would devote its entire time to, and specialize exclusively in, human rights lawmaking. Future lawmaking activity should be concentrated in such an organ, a UN Human Rights Law Commission (UNHRLC), which would function according to well-defined, structured processes particularly suitable for human rights, a broad, but nevertheless specialized, field.<sup>60</sup> The lawmaking processes would gain in efficiency, and the instruments in quality.

The creation of a single expert body would not mean that that body would necessarily monopolize lawmaking activity in the field of human rights, any more than the ILC monopolizes lawmaking in other areas of international law. But the UNHRLC should be entrusted, at least, with the drafting of major instruments of general interest. It may be possible and even desirable from time to time to refer a particular subject to a different, perhaps ad hoc organ, especially where the subject requires particular expertise, or to a broadly representative political organ if it is politically very sensitive. To paraphrase Professor Schachter's discussion of the ILC, when the objectives are not well agreed and the technical issues do not fall within the purview of the general international lawyer, there may be good reason to have recourse to a more specialized body in which the particular subject can be handled by technical experts, govern-

<sup>58</sup> See UN Doc. A/39/535 (1984); Meron, *Towards a Humanitarian Declaration on Internal Strife*, 78 AJIL 859, 865 n.37 (1984).

<sup>59</sup> Alston, *supra* note 1, at 617-21.

<sup>60</sup> UN Doc. A/37/444, at 6 (1982) (comments by Australia).

mental officials and lawyers knowledgeable in the field.<sup>61</sup> In the present state of human rights law, much of the work of the UNHRLC would be devoted to progressive development rather than codification. However, the UNHRLC could also be charged with the preparation of drafts consolidating, improving and revising some of the instruments that have already been adopted. This would include filling lacunae and improving the implementation clauses. When one considers how many instruments have already been adopted, the tasks of revision and consolidation, and in some cases of extending rights by drafting additional protocols to the major human rights treaties as in the Council of Europe, take on special importance.

It might be possible to restructure the present Commission and Sub-Commission and carve out the new lawmaking organ from them. But aside from the lawmaking activities of these organs, their present form and mandates might better be left unaltered. Their agenda is demanding enough without lawmaking, especially if it is recalled that their mandate under resolutions adopted by the General Assembly and ECOSOC extends to all the member states of the United Nations and not only, as is the case with organs established by various human rights treaties, to state parties to particular instruments. Of course, the Commission and the Sub-Commission could also benefit from reform. The Sub-Commission has begun to review its role on an excessively timid note. Let us hope that this examination develops into a significant critique and, eventually, reform.

Leaving aside for a moment the question of the UNHRLC's composition, I will focus first on the process to be followed. There should be prior discussion at the political level, normally by the General Assembly, and sometimes possibly by ECOSOC, of the need to initiate the lawmaking process. Some general guidelines might be adopted at this time. To be well informed, the participants in the preliminary discussion should usually have at their disposal prior studies carried out by the Secretariat or outside experts. The preparatory work would include canvassing the membership and interested organizations by means of detailed questionnaires. Before deciding to start working on an instrument, states should have a clear perception of the need for it and its feasibility. Another question that merits consideration at an early stage of the lawmaking process is the form appropriate to an instrument, i.e., whether it should be a binding agreement or a recommendation. In some circumstances, it might be desirable to start work on two parallel instruments, one binding, the other recommendatory, as in the ILO.<sup>62</sup> The decision as to the type of instrument might

<sup>61</sup> Schachter, *supra* note 1, at 786.

<sup>62</sup> See 1 REVIEW, *supra* note 1, at 19.

Regarding the legal value of declarations, see Schachter, *supra* note 1, at 787-95, and bibliography, *id.* at 804 n.97; Schachter, *The Crisis of Legitimation in the United Nations*, 50 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 3 (1981).

In the ILO and in UNESCO, a decision as to the form of an instrument is required at early stages of the lawmaking process. In United Nations human rights lawmaking, there is no structured rational process for making an informed choice between a declaration and a

have to be reconsidered as more is learned about the problems and the limits of state support for, and interest in, the new instrument.

In the elaboration of the instruments, the UNHRLC would be given constant research support by the Secretariat. The UNHRLC would model its work, *mutatis mutandis*, on the procedures of the ILC, and perhaps, when useful, would borrow some procedural ideas from UNCITRAL, or from other bodies. The UNHRLC should not, however, slavishly follow the ILC model. It should guard against such undesirable features as the undue fragmentation that results from discussing the draft articles over the course of many sessions, and the slow pace characteristic of the ILC. There should be constant resort to rapporteurs, drafting committees, researchers and governments for comments. A single person, however, would have primary responsibility for preparing the first draft. The evolving texts would then be subjected to a fixed number of readings by the UNHRLC according to a predetermined timetable. When the drafting and editing are completed, the instrument would be submitted to a representative organ for adoption; it must be clear that the UNHRLC's role would be limited to formulating the text of the instrument.

As a general but not inflexible rule, major instruments would be submitted to conferences of plenipotentiaries for adoption, after a decision by the General Assembly. Such conferences would have more time, more expertise and more appropriate working methods than the General Assembly for the negotiation and adoption of human rights instruments. The General Assembly should be given the task of adopting a human rights instrument only if the draft approved by the UNHRLC, in view of both its content and the political context, seems likely to be adopted without prolonged negotiations and major revisions. When a text is submitted to the General Assembly for adoption, the Sixth Committee could be involved usefully either by the referral of some matters to it by the Third Committee, or by the creation of a joint committee constituted of these two main committees or by the formation of a working group drawn from their members. The General Assembly ought to consider reviewing Annex II to its Rules of Procedure, "Methods and Procedures of the General Assembly for Dealing with Legal and Drafting Questions,"<sup>63</sup> which inadequately addresses human rights lawmaking, and drawing up more effective rules for its adoption of human rights instruments.

To ensure that the new scheme of things meets with success, adequate

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convention. In a number of cases, a declaration has preceded the adoption of a convention on the subject. The advantages involved in beginning with a declaration are several. A declaration enables the provision of a faster remedy for, or amelioration of, the underlying problems. Certain principles, as well as the reach of the political consensus, can be tested in practice before a commitment is made to elaborate a convention. At the same time, guidelines are established which are useful for the elaboration of a future convention. Where an instrument contains a developed system of supervision, the form of a binding instrument (a convention) may be especially desirable. See generally 1 REVIEW, *supra* note 1, at 19; N. VALTICOS, INTERNATIONAL LABOUR LAW 55-57 (1979).

<sup>63</sup> UN Doc. A/520/Rev.14, at 41 (1982).



and efficient resources must be created in the Centre for Human Rights of the UN Secretariat. Such resources might make it possible to institute "pre-initiation" studies, as practiced by the ILO where they are statutorily required.<sup>64</sup> The UNHRLC will also need strong support from the Secretariat when the preparatory studies are carried out by independent experts or special rapporteurs (unless they can call upon their national governments for help, a practice that is not always in the best interest of the international community). At present, it is unrealistic to expect the Centre for Human Rights to be able to respond to the proliferating requests for in-depth background research and studies.

One facet of the process that cries for improvement is the recording of the preparatory work for the instruments. A strengthened Secretariat could prepare analytical collections of records, as was done, *inter alia*, for the Vienna Convention on Diplomatic Relations,<sup>65</sup> the Vienna Convention on Consular Relations<sup>66</sup> and the Vienna Convention on the Law of Treaties,<sup>67</sup> but not for even the most important instruments in the human rights field. This is not to suggest that official explanatory memorandums on the various instruments should be prepared for adoption by the conferences that are to adopt the texts of the instruments, as this course of action would pose serious problems.<sup>68</sup> Rather, means for improving access to the records of preparatory work<sup>69</sup> should be created. The UNHRLC should prepare commentaries on the draft articles that it adopts, following the pattern established by the ILC. Such commentaries would aid the plenipotentiary conferences or the General Assembly in considering the text for adoption and would constitute an important resource for the interpretation of the instruments. However, they would not be approved formally by these bodies and would not acquire the status of an authoritative commentary.

Let us now turn to the composition and character of the UNHRLC. The body should be relatively small, preferably smaller than the ILC. Like the Commission on Human Rights, it would be elected by ECOSOC and constitute another functional commission of that organ. The basic

<sup>64</sup> UN Doc. A/36/553, at 48 (1981).

<sup>65</sup> See 2 UNITED NATIONS CONFERENCE ON DIPLOMATIC INTERCOURSE AND IMMUNITIES, OFFICIAL RECORDS, UN Doc. A/CONF.20/14/Add.1 (1962).

<sup>66</sup> See 2 UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS, OFFICIAL RECORDS, UN Doc. A/CONF.25/16/Add.1 (1963).

<sup>67</sup> UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS, DOCUMENTS OF THE CONFERENCE, UN Doc. A/CONF.39/11/Add.2 (1971).

See also 2 UNITED NATIONS CONFERENCE ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS, OFFICIAL RECORDS, DOCUMENTS OF THE CONFERENCE, UN Doc. A/CONF.67/18/Add.1 (1976); 3 UNITED NATIONS CONFERENCE ON SUCCESSION OF STATES IN RESPECT OF TREATIES, OFFICIAL RECORDS, DOCUMENTS OF THE CONFERENCE, UN Doc. A/CONF.80/16/Add.2 (1979).

For a list of commentaries on conventions pertaining to narcotic drugs and similar substances, see UN Doc. A/35/312/Add.1, at 30 n.6 (1980).

<sup>68</sup> UN Doc. A/35/312/Add.1, at 5, 9 (1980) (comments by Austria).

<sup>69</sup> *Id.* at 30 (comments by the United Kingdom).

choice appears to be between an organ of representatives of states, such as the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space or UNCITRAL, and a committee of experts elected in their individual capacity, such as the ILC, the Human Rights Committee established under Article 28 of the Political Covenant, the Committee on the Elimination of Racial Discrimination established under Article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Discrimination Against Women established under Article 17 of the Convention on the Elimination of All Forms of Discrimination Against Women, and the Committee Against Torture established under Article 17 of the recently adopted Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>70</sup> While the latter pattern is clearly preferable because it creates better prospects for a high degree of expertise and continuity, and a lesser involvement in politics, I would not regard the establishment of an organ composed of governmental experts as necessarily calamitous. The experience with UNCITRAL and the Council of Europe has shown that when governments are interested enough in influencing the formulation of an instrument they find important, they can and do appoint competent experts. Hence, the careful selection of experts is essential. Moreover, any independent observer of the United Nations cannot avoid becoming increasingly cynical about the independence from their governments of individually elected experts from many member states, especially serving officials of government ministries and state institutions. Nor is the procedure of electing individual experts a guarantee of their professional competence. The crucial point, therefore, is not that members be elected in their individual capacity, but that they be genuine experts.

Those advocating that even the preliminary formulation of UN treaties should be entrusted to governmental representatives argue that this would ensure greater sensitivity to political considerations<sup>71</sup> and a more reliable assessment of the support by states for a new instrument. Obviously, draft texts have to stand the test of acceptance by states.<sup>72</sup> I am not suggesting that human rights lawmaking could or should be apolitical, for lawmaking is a political process. The Secretary-General of the United Nations himself has emphasized that the ILC does not stand aloof from political realities.<sup>73</sup> While excessive politicization of human rights lawmaking should be avoided, the prospects for de-politicizing United Nations human rights activities in general are unrealistic, as recently demonstrated by Professor Franck.<sup>74</sup> What is needed urgently is a better balance between the participation of experts and of generalist diplomats. In any event, the

<sup>70</sup> GA Res. 39/46, UN Doc. A/RES/39/46 (1984).

<sup>71</sup> See generally UN Doc. A/36/553, at 62 (1981).

<sup>72</sup> See UN Doc. A/35/312/Add.1, at 3 (1980) (comments by Austria).

<sup>73</sup> UN Press Release SG/SM/494, July 4, 1983, at 3-4.

<sup>74</sup> Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AJIL 811, 819-30 (1984).

political perspective would be provided constantly by governmental comments, guidelines and instructions from the political organs, and the knowledge of UNHRLC members that their drafts would be submitted for adoption to the political organs. The fact that human rights lawmaking occurs largely in the domain of progressive development should not make the preparation of drafts any less appropriate for a group of individual experts.

The Secretary-General's recent Report on the Work of the Organization calls upon member states to "give serious thought to the best way of doing business"<sup>75</sup> and to examine "existing United Nations practices and consider ways and means to make them more effective in dealing with gross violations of human rights wherever they occur."<sup>76</sup> This challenge also merits acceptance in the field of lawmaking.

The proposal to establish the UNHRLC is likely to be greeted with skepticism, well justified no doubt, about the prospects for reform. It will be said that the United Nations already suffers from a proliferation of organs and that there is no guarantee that the UNHRLC would meet with our hopes and expectations if it were established. Yet the subject of human rights lawmaking is crucial, the present system inadequate, and reforms needed. The academic community therefore has both the moral and the professional obligation to lead the way, to suggest reforms and to work for their adoption. Are human rights less important than the fields in which the United Nations has established better structures and procedures for lawmaking?

THEODOR MERON\*

<sup>75</sup> 39 GAOR Supp. (No. 1) at 2, UN Doc. A/39/1 (1984).

<sup>76</sup> *Id.* at 5.

\* This Comment and also my article, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AJIL 283 (1985), are based on material prepared for a book to be published by Oxford University Press in 1986.

## NOTES AND COMMENTS

### *NICARAGUA V. UNITED STATES: CONSTITUTIONALITY OF U.S. MODIFICATION OF ICJ JURISDICTION*

The United States submitted to the compulsory jurisdiction of the International Court of Justice (ICJ) pursuant to the Declaration of President Harry S. Truman of August 14, 1946.<sup>1</sup> On April 6, 1984, the United States deposited with the Secretary-General of the United Nations a notification stating that the United States was temporarily modifying the 1946 Declaration.<sup>2</sup> Much commentary has been devoted to the political and international law ramifications of the U.S. action, but little attention has focused on its constitutionality. This Note suggests that the modification of the 1946 Declaration by the President acting alone raises serious constitutional problems and that some form of congressional concurrence was required.

Although the Senate's view concerning the legislative identity of the 1946 Declaration is not free from doubt, the weight of the evidence suggests that it was seen by the Senate as a treaty.<sup>3</sup> The Declaration was

<sup>1</sup> 61 Stat. 1218 (1947).

<sup>2</sup> The 1984 notification provided in relevant part that the 1946 Declaration "shall not apply to disputes with any Central American State or arising out of or related to events in Central America," and that the notification would "take effect immediately and shall remain in force for two years." *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility*, 1984 ICJ REP. 392, 398 (Judgment of Nov. 26) [hereinafter cited as *Nicaragua*].

<sup>3</sup> Senator Wayne Morse of Oregon introduced S. Res. 160 on July 28, 1945. 91 CONG. REC. 8,164 (1945). The purpose of the resolution, according to Senator Morse, was to have the President, "upon the recommendation of the Senate," transmit to the United Nations a declaration representing U.S. acceptance of the compulsory jurisdiction of the International Court of Justice established under the UN Charter. *Id.* at 11,088. Upon revision, the resolution became S. Res. 196. *Id.* at 11,097.

The Senate discussed how procedurally the United States should accept ICJ compulsory jurisdiction. Senator Morse suggested that the American delegation to the San Francisco Conference

felt that it [the compulsory jurisdiction question] should not become involved in consideration of the Charter, but that the Charter should be considered independently, and the Senate of the United States should at a later date decide whether it wished to adopt the policy of having this country accept compulsory jurisdiction of the Court.

*Id.* at 8,162. Other senators concluded that the remarks of Mr. Hackworth, Legal Adviser to the State Department, "foreclose[d] the possibility . . . that adherence to the Court could be ordered by a Presidential executive order without consultation with Congress or the Senate." *Id.* at 8,163 (remarks of Sen. Arthur Vandenberg).

The resolution was referred to the Senate Foreign Relations Committee. In its report, the committee observed that "both the President and the Secretary of State have indicated that, in their opinion, either . . . a two-thirds vote of the Senate or . . . a simple majority vote of the two Houses would furnish a satisfactory legal basis for acceptance by the United States

accorded the Senate's advice and consent.<sup>4</sup> The Senate incorporated reservations in its resolution of approval, one of which stipulated that the Declaration "should remain in force . . . until the expiration of 6 months after notice may be given to terminate the declaration."<sup>5</sup> Those reservations were included by President Truman in his Declaration, which was made "in accordance with the Resolution of the Senate of the United States of America (two-thirds of the Senators present concurring therein)."<sup>6</sup> As is required of all treaties under Article 102 of the United Nations Charter,

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of the compulsory jurisdiction clause." S. REP. NO. 1835, 79th Cong., 2d Sess. (1946), *reprinted in* 92 CONG. REC. 10,706, 10,708 (1946). The committee therefore decided that "[i]nasmuch as the declaration would involve important new obligations for the United States, the Committee was of the opinion that it should be approved by the treaty process, with two-thirds of the Senators present concurring." *Id.* at 10,709. However, the committee continued, "[w]hile the declaration can hardly be considered a treaty in the strict sense of that term, the nature of the obligations assumed by the contracting parties are such that no action less solemn or less formal than that required for treaties should be contemplated." *Id.* Finally, the committee concluded that "the proposed declaration . . . is rather a unilateral declaration having the force and effect of a treaty as between the United States and each of the other states which accept the same obligations." *Id.*

Understandably, the remainder of the Senate was somewhat confused as to how it should consider the resolution embodying the declaration. Senator Connally, then Chairman of the Committee on Foreign Relations, made a point of order when the resolution was considered on the floor of the Senate on July 31, 1946, arguing that "this resolution should properly go to the Executive Calendar instead of the Legislative Calendar, because it expresses the concurrence and advice of the Senate to the President; so it has no place on the Legislative Calendar." *Id.* at 10,553. The Chair, however, ruled that "[t]he resolution was reported as a legislative proposition. The Chair is of the opinion it is in order." After some debate on the issue, the Chair declared that it was "of the opinion that the two-thirds vote required [by the resolution did] not make necessary the consideration of the resolution in executive session." *Id.* at 10,556.

The following day, Senator Thomas of Utah asked unanimous consent "that the Senate now proceed, *in executive session*, to the consideration of Senate Resolution 196," to which no objection was made. *Id.* at 10,613 (emphasis added). (Rule 37 of the Standing Rules of the Senate provides for the consideration of treaties in executive session.) Senator Thomas then applauded this form of consideration of the resolution, reasoning that although the declaration accepting compulsory jurisdiction could not "be considered a treaty in the strict sense of the term," it would "have the binding force and effect of a treaty between the United States and the other states which have accepted the compulsory-jurisdiction clause," its "subject matter . . . has always been considered appropriate for senatorial advice and consent," and "the use of the more formal treaty procedure would render impotent any possible objection to the declaration which might be raised on constitutional grounds." *Id.* at 10,617.

<sup>4</sup> S. Res. 196, 79th Cong., 2d Sess. (1946).

<sup>5</sup> *Id.* The most well-known reservation is the so-called Connally reservation, which excludes from ICJ jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." 61 Stat. 1218 (1947).

<sup>6</sup> 61 Stat. 1218 (1947). The legislative history of S. Res. 196 makes clear that the termination proviso was intended to preclude precisely the sort of action represented by the 1984 notification. "The provision for 6 months' notice of termination after the 5-year period," the Senate Foreign Relations Committee said in its report, "has the effect of a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding." S. REP. NO. 1835, 79th Cong., 2d Sess. (1946).

the Declaration was deposited with the Secretary-General of the United Nations.<sup>7</sup> It is listed under "treaties" in the United States *Statutes at Large*.<sup>8</sup>

It is doubtful that the President could have made the Declaration without some form of congressional concurrence. Under long-standing tradition, the Executive has obtained Senate or congressional consent prior to subjecting the United States to real or potential monetary liability. A 1958 memorandum pertaining to the *Hannevig* case, prepared by the Assistant Legal Adviser for International Claims (Spangler), addressed the scope of the President's independent power to pledge the faith of the United States to pay money to a foreign government in satisfaction of a judgment rendered by an international arbitral tribunal.<sup>9</sup> The memorandum concluded that the President is without the power to make an executive agreement to submit a claim to such a tribunal. "It is believed that the Department has always adhered to this view," the Assistant Legal Adviser wrote, "and has recognized that an agreement to pay money, by the President acting alone, would be impossible to fulfill if Congress refused to provide funds for the payment of any judgment which might be rendered against the United States."<sup>10</sup> The memorandum proceeds to observe that such an agreement would "probably contravene one or more" provisions of the Constitution.<sup>11</sup> It notes the statutory limitation upon obligating the United States monetarily unless authorized by law<sup>12</sup> (which is still in effect<sup>13</sup>), and it cites supporting authority from the U.S. Supreme Court.<sup>14</sup>

United States acceptance of the compulsory jurisdiction clause represents the same sort of agreement at issue in the *Hannevig* case. An ICJ judgment against the United States might well entail a monetary award for damages.

<sup>7</sup> 1968-1969 ICJ Y.B. 71-72. The Declaration was enclosed in a letter from Acting Secretary of State Acheson to the Secretary-General of the United Nations, UN Doc. US/ICJ/5 (Aug. 26, 1946), and is found at 1 UNTS 9.

<sup>8</sup> 61 Stat. 1218 (1947).

<sup>9</sup> Memorandum, "Hannevig Case," July 18, 1958, Dep't of State File No. 211.5741 (Hannevig, Christoffer/7-1858), reprinted in 14 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 248-51 (1970).

<sup>10</sup> *Id.* at 249.

<sup>11</sup> Those referred to are art. I, §8 ("Congress . . . shall have the power . . . to pay the debts" of the United States); art. I, §9, cl. 7 ("[N]o money shall be drawn from the Treasury, but in consequence of appropriations made by law"); and art. IV, §3, cl. 2 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States").

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No officer or employee of the United States shall make or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

31 U.S.C. §665(a) (1953), amended by 31 U.S.C. §1341 (1982).

<sup>13</sup> 31 U.S.C. §1341 (1982).

<sup>14</sup> "The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.'" *Alabama v. Texas*, 347 U.S. 272, 273 (1953) (quoting *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840)).

Such exposure cannot constitutionally be undertaken without Senate or congressional consent.

It might be argued that a treaty modification that constricts rather than expands U.S. exposure under the treaty is within the President's sole power. That argument, however, overlooks the significant collateral costs that such an act can cause the United States to incur. An aggrieved state may undertake retorsions against the United States. If the limitation is effectuated in violation of the terms of the treaty—as occurred in the instant case—the United States may be subject to reprisals. Moreover, under principles of reciprocity, another state may invoke the U.S. limitation of jurisdiction in response to a legal action brought against it by the United States.

That the Declaration represents a binding international agreement was decided by the ICJ last November when it held, citing the *Nuclear Tests* cases,<sup>15</sup> that the United States “assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice.”<sup>16</sup> The 1984 notification, the Court said, was “intended to secure a partial and temporary termination” of the Declaration,<sup>17</sup> which is “binding upon it vis-à-vis other States parties to the Optional-Clause system.”<sup>18</sup>

Whether the 1984 notification is characterized as a “temporary termination” of the 1946 Declaration or as an “amendment” to it would seem to make little difference. Each involves an alteration of preexisting rights and obligations and raises the same substantive constitutional question: is the act within the scope of the President's independent constitutional power?

A related issue was presented in *Goldwater v. Carter*.<sup>19</sup> In that case, the Court was confronted with the constitutionality of President Jimmy Carter's 1979 termination of the Mutual Security Treaty with the Republic of China, which was carried out in accordance with its terms but without Senate or congressional authorization. A majority of the Court declined to reach the merits.<sup>20</sup> The only Justice who did, Justice Brennan, argued in dissent that termination of the Treaty “was a necessary incident to Executive recognition of the Peking government, because the defense

<sup>15</sup> *Nuclear Tests (Austl. v. Fr.)*, 1974 ICJ REP. 253, 267, para. 43 (Judgment of Dec. 20).

<sup>16</sup> *Nicaragua*, 1984 ICJ REP. at 419.

<sup>17</sup> *Id.* at 417.

<sup>18</sup> *Id.* at 419. As to the question of reciprocity, the Court held that Nicaragua accepted the same obligation since the “notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction.” *Id.*

<sup>19</sup> 444 U.S. 996 (1979).

<sup>20</sup> *Id.* at 1002 (Rehnquist, J., concurring). Three Justices, Stewart, Stevens, and Chief Justice Burger, joined the concurring opinion of Justice Rehnquist, who viewed the issue as a nonjusticiable political question. *Id.* Justice Powell concurred for “prudential” reasons: the political branches had not reached a “constitutional impasse,” he argued, because Congress had taken no official action. The dispute was between the President and a few members of Congress. *Id.* at 997 (Powell, J., concurring).

treaty was predicated upon the now-abandoned view that the Taiwan government was the only legitimate political authority in China."<sup>21</sup> The power to recognize and to withdraw recognition, Justice Brennan noted, was the President's alone.<sup>22</sup>

*Goldwater* is inapposite to the question at hand. Justice Brennan's rationale is inapplicable here: transmittal of the 1984 notification was not a necessary incident to the exercise of another, independent presidential power. The President's act could be justified only if a plenary power inheres in the President to amend treaties without Senate or congressional concurrence. There are substantial reasons for believing that, whatever the scope of the President's independent constitutional power to terminate a treaty in accordance with its terms, his independent power does not extend to treaty abrogation—the termination of a treaty in violation of its terms. The Mutual Security Treaty with the Republic of China was terminated: the treaty was not violated. Abrogation of a treaty, in contrast, can expose the United States to the imposition of international sanctions, many forms of which (such as monetary damages) clearly implicate constitutional powers of the Congress. If the President cannot without congressional concurrence enter into an international agreement causing the United States to incur liability for monetary damages,<sup>23</sup> it is hard to see how constitutionally he can breach an agreement causing the United States to incur such liability. A similar question arose in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, where Justice Douglas argued that because "just compensation" was owed to the nation's steel mill owners, a congressional appropriation would be required; therefore, Congress must first approve the seizure.<sup>24</sup>

The *Steel Seizure* case, in fact, was viewed by the Senate Foreign Relations Committee as the controlling precedent when the committee addressed the issue of treaty termination during its consideration of the Taiwan Relations Act.<sup>25</sup> The committee emphasized that, as a constitutional matter, termination is different from abrogation:

Because the [U.S.-Republic of China Mutual Security] Treaty is being terminated in accordance with its own terms, no international obligation undertaken by the United States will be violated; the Treaty is not being "abrogated" or breached. Rather, the issue is whether the President may, without the concurrence of Congress or the Senate, . . . terminate a treaty.<sup>26</sup>

The committee concluded that "the constitutional prerogatives of the Congress and the Senate have not been invaded" because termination of a treaty in accordance with its terms falls into the "zone of twilight"

<sup>21</sup> *Id.* at 1007 (Brennan, J., dissenting).

<sup>22</sup> *Id.*

<sup>23</sup> See *supra* text at notes 9–15.

<sup>24</sup> 343 U.S. 579, 631–32 (1952). For the proposition that certain norms of customary international law are binding on the Executive domestically as part of federal common law, see Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U.L. REV. (forthcoming Nov. 1985).

<sup>25</sup> 22 U.S.C. §§3301–3316 (1982).

<sup>26</sup> S. REP. NO. 7, 96th Cong., 1st Sess. 18 (1979).



described by Justice Jackson in his concurring opinion in *Steel Seizure*.<sup>27</sup> "[N]either the Congress nor the Senate has elected to exercise the powers granted it by the Constitution to participate in the process of treaty termination," the committee found. "Had either done so, a different conclusion would likely obtain."<sup>28</sup> Unlike President Carter's action in *Goldwater*, therefore, President Reagan's 1984 notification contravened the express terms of the treaty, placing it in category three of Justice Jackson's analysis—where the President's power is at its lowest ebb.

The differences between the instant case and *Goldwater* are underscored if the 1984 notification is viewed as an amendment to the 1946 Declaration. When the Senate considered the constitutionality of President Carter's termination of the Mutual Security Treaty with the Republic of China, the Foreign Relations Committee expressed concern about the scope of presidential power then asserted by the executive branch. Senators otherwise in agreement with President Carter's action feared that a whole-implies-the-lesser precedent might be established—that the Executive in the future could cite the 1979 action as precedent for the power to amend any treaty.

The Executive moved swiftly to dispel that concern. Spokesmen for both the State Department and the Justice Department concurred that power to amend treaties did not fall within the sole power of the Executive. The Senate Foreign Relations Committee asked the State Department: "Would you agree that the President is not able to alter the terms of an existing treaty in any significant way without the consent of the Senate?"<sup>29</sup> The Department responded: "Yes. However, he may interpret a treaty and secure the agreement of the other party or parties for a particular interpretation or method of implementation."<sup>30</sup> The State Department was then asked: "If the consent of the Senate is required in the case of a

<sup>27</sup> 343 U.S. at 637 (Jackson, J., concurring). Justice Jackson's concurring opinion, the committee said,

seems directly applicable. He suggested three categories for determining which branch prevails in the event of conflicting assertions of power:

(1) When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all the Congress can delegate. . . .

(2) When the President acts in the absence of either a congressional grant or denial of authority, he can rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

(3) When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . .

S. REP. NO. 7, *supra* note 26, at 18–19 (quoting 343 U.S. at 635–37 (Jackson, J., concurring)).

<sup>28</sup> S. REP. NO. 7, *supra* note 26, at 19. See also S. REP. NO. 119, 96th Cong., 2d Sess. (1979), reprinted in 2 M. GLENNON & T. FRANCK, UNITED STATES FOREIGN RELATIONS LAW 411 (1981).

<sup>29</sup> *Treaty Termination: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 214 (1979).

<sup>30</sup> *Id.*

significant amendment to a treaty, why is it not required in the case of the most significant 'amendment' of all—complete termination of all its terms?"<sup>31</sup> The Department responded:

Termination of a treaty, which ends an obligation of the United States, is not analogous to an amendment of a treaty, which changes, extends, or limits the obligation of the United States. Assuming a significant change in a legally binding obligation to another nation, it follows that the Senate should give its advice and consent to such a change. Normally a treaty is changed by another treaty, although the characterization of the amendment may be different (e.g., Protocol).

But termination means the end of the legally binding obligation to another state. As noted in the responses to previous questions, termination may be necessary for many reasons, such as violation, impossibility of performance, completion of the terms of the treaty, formation of a new state, obsolescence, etc., which engage the responsibilities of the President and require him to make terminations. Therefore, the practice of the Nation, particularly in the 20th century, as supported by legal scholars, has been for the President to terminate treaties. The policy difference between termination and amendment of treaties explain [*sic*] the differences in the procedures used.<sup>32</sup>

The Department of Justice agreed that the President may not unilaterally amend a treaty. In response to a letter from Chairman Frank Church, the Department replied:

The President cannot amend a treaty in any significant way by means of an executive agreement or parallel declaration of understanding after it has received the advice and consent of the Senate (unless, of course, the treaty itself sets forth a procedure for amendment or implementation in that way). The understanding of the parties and their practice are admissible in showing what the treaty means (see Vienna Convention on the Law of Treaties, Art. 31(3)) but this is quite different from amendment in the narrow legal sense. The accepted process for amending a treaty is by another treaty. See, for example, Article 39 of the Vienna Convention on the Law of Treaties which notes that the same general rules apply to amendments as apply to treaties themselves. The reasons for amendments to treaties and the circumstances under which they are amended are usually totally different from those involved in treaty termination. Consequently, there is no reason to assume that the same procedures ought to apply to both.<sup>33</sup>

The Reagan administration earlier had appeared to share its predecessor's misgivings about the constitutionality of treaty amendments effected without Senate advice and consent; one reason advanced by the President for declining to sign the 1982 Law of the Sea Convention<sup>34</sup> related to the

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 220-21.

<sup>34</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, in *THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* (UN Pub. Sales No. E.83.V.5).

possibility of its being amended without the Senate's approval.<sup>35</sup> Those misgivings were justified. The existence of plenary presidential power to amend a treaty in violation of its terms would vitiate the Senate's power to approve a treaty conditionally, since any Senate-added reservation—together with any other unwanted provisions—could be unilaterally removed by the President. The power of the Senate to grant its conditional consent to a treaty, the Senate Foreign Relations Committee noted in 1978, is part of customary constitutional law in the United States.<sup>36</sup>

Whether President Reagan's 1984 modification of the 1946 Declaration is called a temporary termination, an amendment or something else, in the absence of Senate or congressional concurrence, his act is unconstitutional.

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### TITLE AND USE (AND USUFRUCT)—AN ANCIENT DISTINCTION TOO OFT FORGOT

Where the object of the property is said to be corporeal that object, the real corporeal object, presents itself necessarily and immediately upon the mention of the property. Where it is said to be incorporeal, the real corporeal object does not thus immediately and necessarily present itself. It is not necessary upon the present occasion to enter into the examination of the necessity there may be for setting up this fiction: it is sufficient that it be actually and universally set up, and that it is so firmly engraved into every language that it is now impossible to carry on a discourse without it.

Bentham, *Of Laws in General*

#### I. PROLOGUE

This Comment was originally written with a view to setting the record straight in one particular respect: the widespread misunderstanding of the rights delineated in the Deepsea Ventures Notice of Discovery and Claim<sup>1</sup> and in the Deep Seabed Hard Mineral Resources Act of 1980.<sup>2</sup> In both

<sup>35</sup> Statement by the President, United Nations Conference on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 95 (Jan. 29, 1982).

<sup>36</sup> SENATE COMM. ON FOREIGN RELATIONS, REPORT ON EXECUTIVE N, S. REP. NO. 12, 95th Cong., 1st Sess. 11 (1978).

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<sup>1</sup> "Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection and Protection of Investment by Deepsea Ventures, Inc.," Letter from John E. Flipse, President of Deepsea Ventures, to Henry A. Kissinger, Secretary of State, Nov. 14, 1974, reprinted in 14 ILM 51 (1975) [hereinafter cited as Deepsea Ventures Notice of Discovery and Claim].

<sup>2</sup> Pub. L. No. 96-283, 94 Stat. 553 (1980), 30 U.S.C. §1401 *et seq.*, 26 U.S.C. §§4495-4498 (1982).

of these instruments, the rights claimed are more accurately to be defined as *res incorporales*, that is, as analogies to usufructs or *profits à prendre*. But critics of those documents have characterized them otherwise, namely, as territorial claims of *dominium* and, indeed, sometimes even as claims of *imperium*.<sup>3</sup> As this attempt at correction developed, however, its writer became impelled, largely for purposes of further explanation and apparently needed clarification, to broaden the basis of the original task. Be that as it may, one hopes that this piece will be read as primarily intended to clarify a point of legal language rather than engage in a more general and more policy-oriented controversy, although, of course, this latter issue is not to be brushed aside. But it should not be permitted to obfuscate the primary goal of this explanatory note.

## II. ELUCIDATION OF THE BASIC OBJECTIVE

The passage from Jeremy Bentham quoted under the title of this Comment points to three very significant qualities of the distinction between title and use (and usufruct): it is universal, it is necessary and it is fictitious. These three attributes, with the added implication that the distinction has analytical utility, may seem to come rather strangely from the legal philosopher who elsewhere vented his vituperative spleen on legal fictions. For example, he excoriated them in the following terms: "In English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness."<sup>4</sup> And: "fictions of use to justice? Exactly as swindling is to trade."<sup>5</sup> Again, he pronounced that the presence of a legal fiction "affords presumptive and conclusive evidence of moral turpitude."<sup>6</sup> These quotations, however, were colored by their author's indignation at the expensive, time-consuming and elaborate procedural abuses of the English courts of common law and equity of his time.

In contrast with his choler at the procedural fictions of the common law, Bentham appears to have accepted the resort of legal science to fictitious language to describe usufructs and other incorporeal rights as both universal and necessary. He acquiesced in this resort to a benign artifice of language, for the purpose of separating the "indirect" (in contrast with the "direct") relation of the owner towards the property-object. The late Professor Lon Fuller, without unquestioningly defending, in the spirit of a modern Blackstone, the propensity of legal fictions to proliferate, observed: "Some legal fictions—far from being merely the metaphorical expression of 'norms'—are in fact expressions of scientific truths discovered by the courts in their struggle to rationalize the subject matters presented to them."<sup>7</sup> In societies that have progressed from

<sup>3</sup> See, e.g., sec. V, "Some Distinguished Commentators," *infra*.

<sup>4</sup> 5 J. BENTHAM, WORKS 92 (Bowring ed. 1843).

<sup>5</sup> 7 *id.* at 283.

<sup>6</sup> 9 *id.* at 77.

<sup>7</sup> Fuller, *Legal Fictions* (pt. 3), 25 ILL. L. REV. 877, 907 (1931). For an authority on the beneficial uses of fictions in the evolution of the law, see H. J. MAINE, ANCIENT LAW 26-45

primitive subsistence farming and defensive property holding for survival, the need for the legal fictions that separate title from use and from usufruct arises, in a more sophisticated age, from the multiple shared benefits from and privileges regarding property. Ownership of these multiple privileges, which are intended to enshrine distinct and separate categories of benefits, coexists with the direct ownership and enjoyment of the property itself. The distinctions among title, use and usufruct in advancing legal systems are made with the object of achieving reconciliation between coexisting, but discretely enjoyed, modes of beneficial use.

The object of this Comment is to restate the long-established distinction between title on the one hand, and use and usufruct on the other, in terms of a specific legal debate that has arisen in recent years through technological innovations. Traditionally, and still today, the distinction provides an essential instrumentality for the rational disposition of common resources. The ideas it reflects remain evergreen, despite changing times and shifting structures. Hence, restating them in terms of the new social environments continues to be an essential task, like lawn mowing or shaving, to eliminate luxuriating growths that would otherwise proliferate. While for over two millennia legal (and religious) theory has distinguished among the titulary, usuary and usufructuary enjoyment of things (resources, tools, clothing, money and land), various recent commentators, including some very eminent publicists,<sup>8</sup> appear to have ignored this important (indeed, perennial and fundamental) distinction in the context of deep seabed mining, where it is crucial to understanding a body of argument that has not lacked practical influence.

### III. THE TRADITIONAL DEFINITION

Before turning to the importance of drawing distinctions among title, use and usufruct relied on in the Deepsea Ventures Notice of Discovery and Claim and in the relevant statutory provisions of the Deep Seabed Hard Mineral Resources Act of 1980, a sampling and brief survey of *profits à prendre* and usufructuary rights should be made to clarify the basic significance of these distinctions in terms of the seabed mining controversy.

#### *Private Law—Roman Civil Law and Anglo-American Common Law*

That the distinctions among title, use and usufruct are valid and essential ingredients in the legal doctrines of the Roman civil law and the Anglo-American common law, as well as in general jurisprudence, is testified to by a wide variety of authors. For example, the late Professor Buckland wrote, in his magisterial *A Text-Book of Roman Law*: "Usufructus was the right to enjoy the property of another and to take the fruits, but

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(Pollock ed. 1920); and for a more contemporary acknowledgment of their potential viability and utility, see Sir Frederick Pollock's *Note D*, *id.* at 46-47, and Fuller, *supra*, pts. 1-3, 25 ILL. L. REV. 363, 513, 877 (1930-31).

<sup>8</sup> See, e.g., *infra* notes 49, 50, and 53 and accompanying text.

not to destroy it, or fundamentally alter its character. . . . Usufruct being incorporeal could not be possessed, but the notion of quasi-possession was applied to it."<sup>9</sup>

Jolowicz testified to the antiquity of the distinction between usufruct and title when he wrote:

Usufruct is the right of using and taking the fruits of property belonging to another, *salva rerum substantia*, i.e., without the right of destroying or changing the character of the thing, and lasting only so long as the character remains unchanged . . . . *Usus* is a similar right, but to the use of the thing only, not including the taking of fruits. . . .

We do not know precisely when either of these rights came to be recognised, but usufruct was well known to Cicero, and we hear of a question concerning it that was debated by the jurists of the second century B.C. It may well be that it arose about the first half of the third century B.C. . . .<sup>10</sup>

Incidentally, the comment has been offered that ownership is provided for in the Deep Seabed Hard Minerals Act of 1980. But the ownership recognized in that statute is not ownership of mining tracts in their territorial extent, or of the minerals in place on (or in) the seabed. As in the traditional theory of usufructuary rights, the Act simply recognizes a right of ownership of the fruits of the mining activity, once they have been separated from the seabed.

To return to Roman law, items severed by the *usufructarius* thereupon become his property. This right is necessary to the concept and rights of the Roman *usufructarius* as well as to those of the grantee of a common law *profit à prendre*. (These concepts provide the analogical basis of explanation here.) Such rights, of course, are distinguishable from the right of *usus* under Roman law. *Usus*, which is also germane to this Comment, has been described as a "fraction of usufruct" or "*usufruct* without the *fructus*."<sup>11</sup> Buckland offers the following example of this "fractional right":

The usuary of a house might live in it, with his household and guests, but might not sell or let it, as this was in the nature of taking fruits. . . . Of the produce he might sell nothing. At first he could take nothing, but this was gradually relaxed, and the rule of the Digest was that he could take produce for the needs of his household but no more.<sup>12</sup>

<sup>9</sup> W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 269-70 (3d ed. rev. Peter Stein 1963).

<sup>10</sup> H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 282 (2d ed. 1967) (footnotes omitted). The last sentence of the above quotation was deleted in the third edition, H. JOLOWICZ & B. NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 269 (3d ed. 1972).

<sup>11</sup> W. BUCKLAND, *supra* note 9, at 273.

<sup>12</sup> *Id.* See also S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 203 (2d ed. 1981), writing of a 1308 case, in which the Friars Minor of Oxford said "that they claim nothing *nisi tantum usum et aisiamentum* in keeping with their vows." Here, so Milsom tells

Such a concept of use without title either to the land or the fruits apart from those taken for consumption does not provide the analogy here. This paper looks, rather, to the usufructuary's rights for light and guidance.

This brief roundup of analogies illustrates how diverse legal systems formulate the means for simultaneously enjoying distinct and disparate privileges and rights in the same object without extinguishing any of them. They can coexist and, while serving divergent purposes, maximize the variety of the legal means of enjoyment. The specific benefits can be distributed, and coexistent uses may remain mutually unimpaired. Similarly, in the international arena, the lawful claims of some states, on behalf of their citizens and enterprises, for exclusive privileges of taking minerals from the seabed still leaves respected and undisturbed the claims of mankind to its common heritage.

For testimony from leading authorities in the Anglo-American common law on the universality and antiquity of incorporeal property rights in general, and *profits à prendre* (approximate equivalents of usufructs) in particular, it is hardly necessary to look beyond Maitland and Holdsworth. The former told us:

The realm of mediaeval law is rich with incorporeal things. Any permanent right which is of a transferable nature, at all events if it has what we may call a territorial ambit, is thought of as a thing that is very like a piece of land. . . . The lawyer's business is not to make them things but to point out that they are incorporeal.<sup>13</sup>

Again, Holdsworth, quoting Maitland, wrote:

"The man of the thirteenth century does not say, 'I agree that you may have so many trees out of my copse in every year'; he says, 'I give and grant you so much wood.' The main needs of the agricultural economy of the age can be met in this manner without the creation of any personal obligations."<sup>14</sup>

And Milsom tells us, succinctly, that "our modern rules about *profits à prendre* have very ancient roots."<sup>15</sup>

Typical of all the authors on the subject of "positive jurisprudence," both ancient and modern, Professor Glanville Williams's edition of

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us, *usus* was not translating *oepe*s, but was rather a right to use and enjoy (in the Roman sense) and hence outside the mainstream of the development of English uses.

In mythology, again, at least as seen through 15th-century eyes, the distinction between ownership and use (in the Roman sense) explains King Arthur's obligation, at his death, to return Excalibur to "the lonely maiden of the lake." See SIR T. MALLORY, *WORKS*, Bk. I, *Merlin* 35 and Bk. 21, *The Day of Destiny* 715-16 (Vinaver 2d. ed. 1971).

<sup>13</sup> 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 123 (1895).

<sup>14</sup> W. HOLDSWORTH, *HISTORICAL INTRODUCTION TO THE ENGLISH LAND LAW* 90 (1934) (quoting *id.* at 145). See also 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 138-51 (3d ed. 1922).

<sup>15</sup> S. MILSOM, *supra* note 12, at 101.

Salmond's *Jurisprudence* distinguishes between *jura in re propria* and *jura in re aliena* and stresses their concurrent nature.<sup>16</sup>

*The Distinction Applied in Treaties: Some Examples*

*Jura in re aliena* have long been accepted and recognized in international law, as they have been in other civilized systems. This reception is testified to by the Treaty of Utrecht of 1713<sup>17</sup> in which, on the cession of Newfoundland by France to Great Britain, certain rights of fishery and incidental rights (such as drying nets) were conceded to France. Again, by treaties between the United States and Great Britain in 1783<sup>18</sup> and 1818,<sup>19</sup> express rights of fishery in the territorial sea of British North America were reserved to citizens of the United States.

Another treaty example of the acceptance in international legal relations of mutual *jura in re aliena* is the 1939 agreement between the Netherlands and the German Reich, which provided for the most economic mining of a common coal deposit on either side of their frontier. The surface boundary was not applied in the mining galleries. Instead, the Treaty granted privileges of continuing a single working from either side of the boundary.<sup>20</sup> Here, again, there was no recognition of an obligation to

<sup>16</sup> SALMOND ON JURISPRUDENCE 293-97 (11th ed. Glanville Williams 1957); see also *id.* at 110-11 (12th ed. Fitzgerald 1966); and 2 AUSTIN'S JURISPRUDENCE 877-84 (4th ed. Campbell 1879).

<sup>17</sup> Treaty of Peace and Friendship, Apr. 11, 1713, France-Great Britain, Art. 13, 27 Parry's TS 475, 486.

<sup>18</sup> Definitive Treaty of Peace, Sept. 3, 1783, Great Britain-United States, Art. III, 48 Parry's TS 487, 492, 8 Stat. 80, TS No. 104.

<sup>19</sup> Convention on Fisheries, Boundary and Restoration of Slaves, Oct. 20, 1818, Great Britain-United States, Art. I, 69 Parry's TS 293, 294-95, 8 Stat. 248, TS No. 112.

<sup>20</sup> See Treaty between the German Reich and the Kingdom of the Netherlands for the Determination of the Working Boundary of the Coal Mines Situated on Both Sides of the Frontier along the River Worm, May 17, 1939, 1939 Staatsblad van het Koninkrijk der Nederlanden No. 30, 199 LNTS 251. Another example is provided by the first two articles of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands relating to the Exploitation of Single Geological Structures Extending across the Dividing Line on the Continental Shelf under the North Sea, 1967 Gr. Brit. TS No. 24 (Cmd. 3254). Those articles provide as follows:

*Article 1*

If any single geological mineral oil or natural gas structure or field extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties will seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the costs and proceeds relating thereto shall be apportioned, after having invited the licensees concerned, if any, to submit agreed proposals to this effect.

*Article 2*

Where a structure or field referred to in Article 1 of this Agreement is such that failure to reach agreement between the Contracting Parties would prevent maximum ultimate recovery of the deposit or lead to unnecessary competitive drilling, then any



compensate the state in whose territory a deposit was to be worked in any given case. Presumably, the mutual privileges and uses of the states were expected to cancel one another out. This last variation is significant because it demonstrates that international law is able, through the agreement of the parties, to recognize a state's privilege of taking a resource from the independent and sovereign territory of another state.<sup>21</sup>

#### IV. VALIDITY, LEGALITY AND *LEX FERENDA*

This section introduces the more general contextual and policy issues against which the significance and perspective of invoking the traditional distinctions among title, use and usufruct will be revealed. In a very real sense, the purpose here may be analogized to an explanation of religious orders' vows of poverty that attempts to convey the context of their rejection of ownership ("title") and their acceptance of goods for clothing and nourishment ("use") and the significance of that distinction for their commitments.

##### *The Dispute*

On August 3, 1984, an international agreement was signed in Geneva between "reciprocating states" that bound the signatories mutually to recognize the exclusive rights to mine deep seabed areas beyond areas of national maritime jurisdiction of enterprises and consortia licensed by

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question upon which the Contracting Parties are unable to agree concerning the manner in which the structure or field shall be exploited or concerning the manner in which the costs and proceeds relating thereto shall be apportioned, shall, at the request of either Contracting Party, be referred to a single Arbitrator to be jointly appointed by the Contracting Parties. The decision of the Arbitrator shall be binding upon the Contracting Parties.

One method contemplated as a possible outcome of the negotiations was the unified working of a single resource or deposit, with an apportionment among the parties of the costs and proceeds. To work the deposit in a unified way as the agent state, that state would, in effect, have to be given a usufructuary right over the resources on the other side of the boundary coupled with an obligation to account and to act, generally, in a fiduciary manner. For a fuller indication of this "agent state" model, see Goldie, *The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?*, 16 N.Y.L.F. 327, 370 (1970); Goldie, *The Oceans' Resources and International Law—Possible Developments in Regional Fisheries Management*, 8 COLUM. J. TRANSNAT'L L. 1, 44-45 (1969).

<sup>21</sup> While international arbitral or judicial decisions regarding usufructuary rights are rare, those involving other types of *jura in re aliena* are quite frequently met with. See, e.g., *The Wimbledon*, 1923 PCIJ, ser. A, No. 1; *Free Zones of Upper Savoy and the District of Gex*, 1932 PCIJ, ser. A/B, No. 46; *Advisory Opinion on Access of Polish War Vessels to the Port of Danzig*, 1931 PCIJ, ser. A/B, No. 43. In this last case, the possibility of a right of anchorage was examined but found not to have been provided in the relevant treaty, the Danzig-Polish Treaty concluded at Paris on Nov. 9, 1920. The Court added: "[T]he relevant decisions of the Council of the League of Nations and of the High Commissioner, do not confer upon Poland rights or attributions as regards the access to, or anchorage in, the port and waterways of Danzig of Polish war vessels." *Id.* at 148.

each of them.<sup>22</sup> The United States is a party to this agreement and its participation had previously been authorized by Congress in section 118 of the Deep Seabed Hard Mineral Resources Act of 1980.<sup>23</sup> The legal validity of the agreement is predicated on customary international law and on the doctrine of the freedom of the high seas. But it has not lacked for critics. For example, some critics claim that it is invalid as a result of the asserted law-creating impact of countervailing resolutions of the United Nations General Assembly, especially the Deep Seabed Mining Moratorium Resolution of December 15, 1969,<sup>24</sup> Article I of the Declaration of Principles Governing the Seabed and Ocean Floor and the Subsoil Thereof beyond the Limits of National Jurisdiction<sup>25</sup> and, more generally, the resolutions that were agreed upon as heralding the "New International Economic Order."<sup>26</sup> According to the publicists who uphold this position, the overall effect of these resolutions has been to establish a "central enclosure"<sup>27</sup> of the bed of the high seas, which makes any individual person's or state's mining activity a breach of the rights of all mankind.<sup>28</sup>

<sup>22</sup> Provisional Understanding regarding Deep Seabed Mining, *done* at Geneva Aug. 3, 1984, reprinted in 23 ILM 1354 (1984) [hereinafter cited as *Provisional Understanding*].

<sup>23</sup> 94 Stat. 553 (1980), 30 U.S.C. §1401 (1982).

<sup>24</sup> GA Res. 2574D (XXIV), 24 UN GAOR Supp. (No. 30) at 11, UN Doc. A/7630 (1969).

<sup>25</sup> GA Res. 2749 (XXV), 25 UN GAOR Supp. (No. 28) at 24, UN Doc. A/8082 (1970) [hereinafter cited as *Declaration of Principles*]. Article 1 provides: "The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind."

<sup>26</sup> See, e.g., United Nations Charter of the Economic Rights and Duties of States, GA Res. 3281 (XXIX), 29 UN GAOR Supp. (No. 31) at 50, UN Doc. A/9631 (1974). See also (1) International Development Strategy for the Second United Nations Development Decade, GA Res. 2626 (XXV), 25 UN GAOR Supp. (No. 28) at 39, UN Doc. A/8028 (1970); (2) Declaration on the Establishment of a New International Economic Order, GA Res. 3201 (S-VI), S-6 UN GAOR Supp. (No. 1) at 3, UN Doc. A/9559 (1974); (3) Programme of Action on the Establishment of a New International Economic Order, GA Res. 3202 (S-VI), S-6 UN GAOR Supp. (No. 1) at 5, UN Doc. A/9559 (1974); (4) Development and International Economic Co-operation, GA Res. 3362 (S-VII), S-7 UN GAOR Supp. (No. 1) at 3, UN Doc. A/10301 (1975); Preparations for an International Development Strategy for the Third United Nations Development Decade, GA Res. 33/193 (XXXIII), 33 UN GAOR Supp. (No. 45) at 121, UN Doc. A/33/45 (1979). See also GA Res. 32/174 (XXXII), 32 UN GAOR Supp. (No. 45) at 107, UN Doc. A/32/45 (1977).

<sup>27</sup> For the intendment of this term as indicating the vesting of a zone (outer space, the deep seabed) and its resources in the world community, acting through the agency of an administrative authority having exclusive control over access, and of ending any regime of free and equal access, see Friedheim, *Arvid Pardo, The Law of the Sea Conference, and the Future of the Oceans*, in *MANAGING OCEAN RESOURCES: A PRIMER* 149, 154 (1979), where he writes: "Professor Pardo's preference for central or international closure is clear and unequivocal." He reinforces this assertion with a quotation from Dante's *De Monarchia*.

<sup>28</sup> See, e.g., statements by the Group of Legal Experts on the Question of Unilateral Legislation to the following effect:

The principles of law laid down in resolution 2749 (XXV) form the basis of any international regime applicable to the Area and its resources. . . .

Consequently, any unilateral act or mini-treaty is unlawful in that it violates these principles, for the legal regime, whether provisional or definitive, can only be established

This argument contrasts with the view of the Western "developed" states. They interpret the phrase "common heritage of mankind" as establishing the relevant resources as *res communis*, while the advocates of "central enclosure" argue that the seabed area and its resources are *res publicae*. This perception was clearly characterized by Ambassador Pinto at the Law of the Sea Workshop of December 11-14, 1978 at the University of Hawaii. He argued that, as a result of the General Assembly vote on the Declaration of Principles,<sup>29</sup> the legal status of the seabed and its resources beyond the limits of national jurisdiction should now be defined as follows:

This [i.e., the common heritage of mankind] means that those minerals cannot be freely mined. They are not there, so to speak, for the taking. The common heritage of mankind is the common property of mankind. The commonness of the "common heritage" is a commonness of ownership and benefit. The minerals are owned in common by your country and mine, and by all the rest as well. In their original location these resources belong in undivided and

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with the consent of the international community as the sole representative of mankind and in conformity with the system determined by the international community.

It should be stressed that no investor would have any legal guarantee for his investments in such activities, for he would likewise be subject to individual or collective action by the other States in defense of the common heritage of mankind, and no purported diplomatic protection would carry any legal weight whatsoever.

Letter from the Group of Legal Experts on the Question of Unilateral Legislation to the Chairman of the Group of 77, Apr. 23, 1979 [hereinafter referred to as Manifesto], UN Doc. A/CONF.62/77 (1979), 11 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 80 [hereinafter cited as OFF. REC.]. See also ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, STUDY ON THE REVISED SINGLE NEGOTIATING TEXTS (Kuala Lumpur 1976), where the following statement received agreement:

The only way which this concept [i.e., the status of the hard mineral resources of the deep ocean floor beyond the territorial jurisdiction of any state as "the common heritage of mankind"] can be translated into practice would be to treat the resources of the area as being under the joint undivided ownership of all nations. . . . If this is so, then the activities in the area have necessarily to be under [the] effective control of the international authority acting on behalf of the entire international community and activities by individual States or their nationals cannot be permitted except when doing so on behalf of the authority.

The thesis of this assertion was rejected in the Statement by the Representative of the United States of America in Response to the Statement by the Chairman of the Group of 77 Contained in Document A/CONF.62/89, UN Doc. A/CONF.62/93 (1979), 12 OFF. REC. at 111. See further Letter dated Aug. 29, 1980 from the Chairman of the Group of 77 to the President of the Conference Transmitting a Document Entitled "Legal Position of the Group of 77 on the Question of Unilateral Legislation concerning the Exploration and Exploitation of the Seabed and Ocean Floor and Subsoil Thereof beyond National Jurisdiction," UN Doc. A/CONF.62/106 (1980), 14 OFF. REC. at 111. See finally the response thereto by the United States: Letter dated 30 July 1980 from the Representative of the United States of America to the President of the Conference transmitting a statement delivered to the 130th plenary meeting on 28 July 1980, UN Doc. A/CONF.62/103 (1980), 14 OFF. REC. at 109.

<sup>29</sup> That vote was as follows: 108 in favor, 0 against, 14 abstaining, 0 absent.

indivisible share, to your country and to mine, and to all the rest—to all mankind, in fact, whether organized as States or not. If you touch the nodules at the bottom of the sea, you touch my property. If you take them away, you take away my property.<sup>30</sup>

The thesis of the Group of 77 has already been critically analyzed and responded to by this writer<sup>31</sup> and will not be further pursued in this brief Comment, except to point out two considerations that must be fatal to any argument that Article 1 of the 1970 Declaration of Principles has effectuated a central enclosure, here and now.

The alternative interpretation of the phrase "common heritage of mankind," adhered to by the Western developed countries (and especially the signatories of the Provisional Understanding<sup>32</sup>), is based on the doctrine of the freedom of the seas. It simply indicates equal and free common access—the commonness of a common well, for example, from which all may draw their water, or of a common pasture, where all their livestock may graze. Each commoner may take away water from the well, and his cattle may take, eat and consume the grass of the common meadow. But his right of common does not include title to any part of the well or of the field other, of course, than his shared right of commonage. This latter interpretation argues that states may not acquire territorial or proprietary ownership of or in the area open for deep seabed mining activities, but that they are permitted to enjoy the use of the area and its resources, exercising in personam jurisdiction over their citizens and enterprises that engage in such uses.

Second, the reminder should be stressed that, in the contemporary international legal and political order, the imposition of obligations by means of procedures that have not themselves come about through an unexceptionable consensus can be dangerous to the security and acceptability of international law. To ignore it in any context touching on the existing rights and privileges of sovereignty may create a potentiality for a dangerous precedent. This concern highlights the moral value of obedience to law by raising the question whether a specific rule of law has complied with agreed-upon constitutive norms and so is to be obeyed, or whether such a demand for obedience has failed to meet these criteria and so may jeopardize the reception of other basic values held by the states in question. In the discussion that follows, two main issues germane to this question will be raised, namely, legitimacy and the indeterminacy of a claimed obligation that is capable of formulation in terms of alternative (and contradictory) meanings.

<sup>30</sup> Pinto, *Statement*, in *ALTERNATIVES IN DEEPSEA MINING* 13 (S. Allen & J. Craven eds. 1979).

<sup>31</sup> See Goldie, *A Note on Some Diverse Meanings of the "Common Heritage of Mankind,"* 10 SYRACUSE J. INT'L L. & COM. 69 (1983).

<sup>32</sup> *Supra* note 22.

*Ascribing a Legislative Competence to the General Assembly Binding on  
Nonconsenting States*

The first argument is that an interpretation that seeks to spell legal duties and disabilities out of an indeterminate slogan should be read in the light of the explanations of the votes given in its favor in the First Committee of the General Assembly. Such a reading reveals it as a tentative compromise on agreed words without agreement on their meaning. As Judge Sir Robert (formerly Professor R. Y.) Jennings has observed, "seen in the light of these explanations the Declaration assumes a very different aspect from that reflected in the mere text of it."<sup>33</sup> Furthermore, the difference in the understanding of many of the agreeing states, and the meaning now given to it by the "Group of Legal Experts" or by Ambassador Pinto in formulating the Group of 77's thesis, indicates that the latter's interpretation cannot be regarded as reflecting, let alone reporting accurately, whatever consensus existed at the time of the General Assembly's vote. Indeed, far from having the legislative mandate claimed for it (for example) by the "Group of Legal Experts" in its Manifesto,<sup>34</sup> the interpretation of the Declaration of Principles on behalf of a central enclosure cannot even find support under customary international law since its advocates can show neither universal *opinio juris* nor general support in practice by the states most significantly interested or directly affected.<sup>35</sup> A regime purporting to replace and terminate existing rights and existing immunities and privileges that are here and now guaranteed by the freedom of the seas has a very heavy burden of proof to discharge. This task, in light of the many opposing statements by the representatives of key states and the silence of others on this point, has clearly not been satisfied.<sup>36</sup>

More generally, there has been no consensus in the United Nations to amend the Charter fundamentally by reversing the decision, taken at San Francisco in 1945, to rebuff the Philippines proposal that the General Assembly be accorded competence to prescribe rules of international law. Yet to argue that Article 1 of the Declaration of Principles has had lawmaking effect necessarily involves such a reversal. Professor Julius Stone has formulated a pertinent policy consideration with considerable and characteristic forcefulness:

This is not a time when any State, let alone the Western States, can afford to submit supinely to the edicts of hostile majorities,

<sup>33</sup> Jennings, *The United States Draft Treaty on the International Seabed Area: Basic Principles*, 20 INT'L & COMP. L.Q. 433, 439 (1971).

<sup>34</sup> See note 28 *supra*.

<sup>35</sup> On the necessity of state practice in relation to the possibility of characterizing some resolutions of the United Nations General Assembly as customary international law, see Goldie, *International "Constitutionality": State Sovereignty and the Problem of Consent*, in LEGAL CHANGE: ESSAYS IN HONOUR OF JULIUS STONE 316, 321-24 (Blackshield ed. 1983).

<sup>36</sup> See Goldie, *supra* note 31, at 78-86 and 91-105.

counted, vote for vote, without distinction down to the most mini-of mini-States, especially when those edicts lack moral or legal basis. What is in issue is no mere objection to particular resolutions, but the checking and arrest of the strategic design of certain States to use the General Assembly for imposing their arbitrary will on others. Such a use of the General Assembly violates both the words and the spirit of the Charter, which strictly withheld this kind of power from that body.<sup>37</sup>

*Viewing Lex Ferenda as Lex Lata—the Dangers of Wishful Thinking*

In drafting part XI and Annexes III and IV of the United Nations Convention on the Law of the Sea,<sup>38</sup> the Third United Nations Conference on the Law of the Sea chose explicitly the Group of 77's interpretation of the common heritage. When the treaty enters into force, that particular interpretation will be law for the parties to it. But until that time, the status quo, the opposite of the central enclosure, namely, the customary free and open access to the oceans beyond national jurisdiction and to their resources, will remain the governing principle unless state practice as well as *opinio juris* can demonstrate a change in customary international law. The issue taken here is not with the formulation of the common heritage principle in the Convention, but with the thesis that, even without its entry into force, and as a matter of customary international law, those provisions which were written into part XI and Annexes III and IV as *leges ferendae* have become *leges latae* as a result of some process not yet generally accepted as validly constitutive.

V. *JURA IN RE PROPRIA AND IN RE ALIENA*

*"Common Heritage" and the Distinction between Title and Use*

If, indeed, the bed of the deep ocean floor, and its resources are, here and now, "the common heritage of mankind," then the distinctions separating title, use and usufruct become important. Just as a person with the privilege of pasturing his herd on a common field has no title to that field but has the use of the grass eaten by his cattle, so the deep seabed miner may mine manganese nodules without "owning" the tract from which he may exclusively take minerals that become his upon their severance. He merely enjoys an exclusive privilege of taking the mineral resource from a prescribed area of the commons. This exclusive privilege accrues to him through the reception and consecration by public international law of the traditional doctrine of the freedom of the high seas and through his own country's personal jurisdiction over him and others by which his mining activities are regulated and controlled. The miner's exclusive privilege and ownership of the minerals once removed from the

<sup>37</sup> J. STONE, *CONFLICT THROUGH CONSENSUS* 172 (1977).

<sup>38</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, in *THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* (UN Pub. Sales No. E.83.V.5).

seabed may also be further protected by a reciprocal regime agreement, for example, that signed on August 3, 1984.<sup>39</sup>

Critics of the reciprocal regime for seabed mining, and of the U.S. Deep Seabed Hard Mineral Resources Act of 1980, have raised a chorus of denunciation, which includes the allegation that mining without a license from a central agency controlling the enclosed seabed areas involves neocolonialist, territorialist and annexationist policies.<sup>40</sup> These allegations carry the charge of seeking to obtain title and sovereignty over seabed territories adversely to the world community's public property in those regions. This criticism, however, is beside the point, since what the United States claims is not territory, but merely a particular right of use and removal of minerals: not titles of ownership for its enterprises, but the privileges of use and usufruct. While recognizing the inalienability of the commons, the United States merely claims for its citizens and enterprises the shared privilege of reciprocal, exclusive access and enjoyment on a footing of equality.

#### *Title and Use and Permitted Activities in Outer Space*

Two treaties, one in force and the other still not binding on the United States, concerning the law of outer space, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies of 1967<sup>41</sup> (Principles Treaty) and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies<sup>42</sup> (Moon Treaty), provide against the acquisition of territorial sovereignty (*imperium*) or even tract ownership (*dominium*). Thus, Article II of the former provides: "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."

In light of this prescription, it is possibly arguable that because sovereignty is banned, land proprietorship becomes impossible. Be that as it may, Article III of the same agreement provides for, and limits, states' privileges of "carrying on activities in the exploration and use of outer space, including the moon and other celestial bodies." Other articles such as Article IX also refer to "the exploration and use" of outer space.<sup>43</sup> It should be noted that in the Principles Treaty, "use," like "exploration" in outer space, is an "activity."

<sup>39</sup> See note 22 *supra*.

<sup>40</sup> For a selection of criticisms of this legislation and a response thereto, see Goldie, A *Selection of Books Reflecting Perspectives in the Seabed Mining Debate: Part I*, 15 INT'L LAW. 293, 297-302 (1981), and the materials therein cited.

<sup>41</sup> Done Jan. 27, 1967, 610 UNTS 205, 18 UST 2410, TIAS No. 6347 (entered into force Oct. 10, 1967) [hereinafter cited as Principles Treaty].

<sup>42</sup> Adopted and opened for signature by GA Res. 34/68, Dec. 5, 1979, 34 UN GAOR Supp. (No. 46) at 77, UN Doc. A/34/46 [hereinafter cited as Moon Treaty].

<sup>43</sup> See, e.g., Principles Treaty, *supra* note 41, Arts. X, XIII.

Again, in the Moon Treaty, we find, for example in Article 4, paragraph 1 and in Article 7, paragraph 1, the use of the term "exploration and use."<sup>44</sup> Article 11 provides that the "moon and its natural resources are the common heritage of mankind." Paragraph 2 of this article reenacts Article II of the Principles Treaty by asserting that the "moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation or by any other means." In addition, paragraph 5 of Article 11 anticipates the performance of an undertaking to establish, by a future agreement, a "central enclosure"<sup>45</sup> type of regime, by calling upon the states parties to give an undertaking "to establish an international regime" governed by certain basic instructions and purposes contained in paragraphs 6 and 7.

Since it calls for an undertaking to act in the future, the invocation of the "common heritage" principle in the Moon Treaty (in Article 11, paragraph 1), unlike that in Article 1 of the General Assembly's Declaration of Principles governing seabed mining,<sup>46</sup> cannot be read as providing, here and now, that the moon and outer space are centrally enclosed and are *res publicae*.<sup>47</sup> Otherwise, there would be no point in calling for the future establishment of a regime based on a central enclosure. In addition, while the Moon Treaty, like the Principles Treaty, precludes territorial acquisition, it does not preclude either use or usufruct, as paragraph 4 of Article 11 demonstrates. It provides as follows: "States Parties have the right of exploration and use of the moon without discrimination of any kind, on the basis of equality and in accordance with international law and the provisions of this Agreement."

The draftsmen of the 1967 and 1979 outer space treaties sought to preclude states from establishing rights of *imperium*, and enterprises and individuals from acquiring territorial rights of territorial *dominium*, yet neither agreement seeks to preclude rights of usufruct and use. The inference is inevitable that, if these treaties do not seek to preclude the rights of use, customary international law cannot be read as having already done so, at least in outer space.

#### *Some Distinguished Commentators*

Implicitly criticizing the support of industrialized "Western and other" countries for open access to seabed resources, Professor Oscar Schachter tells us that a "legal premise" of their proceeding "independently to develop and produce the seabed minerals under tacit or express arrangements among themselves" (e.g., the Provisional Understanding of August 3, 1984<sup>48</sup>) is "that the seabed beyond national jurisdiction is not *res*

<sup>44</sup> See also Moon Treaty, *supra* note 42, Art. 8.

<sup>45</sup> See note 27 *supra* and text accompanying notes 27-30.

<sup>46</sup> *Supra* note 25.

<sup>47</sup> For a discussion of this Roman law concept as elucidating one interpretation of the "common heritage" doctrine, see text at notes 29 and 30 *supra*.

<sup>48</sup> *Supra* note 22.



*communis* but *res nullius* open to appropriation, irrespective of General Assembly declarations to the contrary."<sup>49</sup> In so doing, one understands, these countries are failing to "share the world's resources" and are engaging in a kind of Oklahoma land grab or "Partition of Africa." Similarly, another distinguished international lawyer, Professor Louis B. Sohn, has written:

A third view proposed by some legal scholars argues that the deep seabed, like unclaimed land, belongs to no one (*res nullius*) and may be appropriated to the exclusion of all others by the first nation which claims and exploits a particular area of the seabed. See, e.g., Goldie, "Customary International Law and Deep Seabed Mining," 6 Syracuse J. Int'l L. & Com. 173 (1978-79).<sup>50</sup>

In a review of Professor Schachter's book, this writer pointed out that the author had overlooked the distinction between title and use (a distinction, moreover, that is essential to an understanding of the Deep Seabed Hard Mineral Resources Act and the Provisional Understanding, and of the earlier Notice of Discovery and Claim filed by Deepsea Ventures in 1974<sup>51</sup>). In response to the thesis already quoted,<sup>52</sup> the review explained:

Although many critics of the "reciprocating regime" blueprint assert that it involves the appropriation of seabed areas beyond zones of national jurisdiction, most supporters of the regime consider the implication of an unlawful (or impolitic) acquisition of seabed "territory" as a red herring. The regime's advocates argue that it is necessary to distinguish between the acquisition of *imperium* (sovereignty) over a seabed area (which they say they reject) and *dominium* (ownership) over removable resources (for which they argue). The advocates' proposal is that states, on behalf of the enterprises they espouse, should seek the conferral of no more than an exclusive license, or a usufructuary right, to remove the resources recovered from the bed of the free high seas. These proponents further point out that the fruits *res communis* may be appropriated anyway and that, therefore, they should not be accused of advocating the acquisition of seabed "territory."<sup>53</sup>

The Deepsea Ventures Notice of Discovery and Claim itself made the above distinction the central and definitive attribute of the right it asserted by formulating that right in the following terms:

<sup>49</sup> O. SCHACHTER, SHARING THE WORLD'S RESOURCES 55 & footnote (1977).

<sup>50</sup> L. SOHN & K. GUSTAFSON, THE LAW OF THE SEA IN A NUTSHELL 174 (1984). There are, of course, numerous other writings to the same confusing and misleading effect, but of less persuasive character than those cited from the two distinguished publicists quoted in the text. Some, indeed, while paying passing lip service to the distinction between title and use, proceed with a confused review that is premised on the nonexistence, or at least the nonmeaningful existence, of the distinction. See, e.g., Burton, *Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims*, 29 STAN. L. REV. 1135 (1977).

<sup>51</sup> See note 1 *supra*.

<sup>52</sup> See note 40 *supra* and accompanying text.

<sup>53</sup> Goldie, Book Review, 16 COLUM. J. TRANSNAT'L L. 555, 561 (1977).

Deepsea asserts the exclusive rights to develop, evaluate and mine the Deposit and to take, use, and sell all of the manganese nodules in, and the minerals and metals derived, therefrom. It is proceeding with appropriate diligence to do so, and requests and requires States, persons, and all other commercial or political entities to respect the exclusive rights asserted herein. Deepsea does not assert, or ask the United States of America to assert, a territorial claim to the seabed or subsoil underlying the Deposit. Use of the overlying water column, as a freedom of the high seas, will be made to the extent necessary to recover and transport the manganese nodules of the Deposit.<sup>54</sup>

The juridical analogy relied upon in this paragraph is that of "miner's right" or "mineral right."<sup>55</sup> A similar legal concept characterizes and underpins sections 3(a) and 102(b)(1) and (3) of the Deep Seabed Hard Mineral Resources Act of 1980.

Section 3(a) states:

(a) **DISCLAIMER OF EXTRATERRITORIAL SOVEREIGNTY.**—By the enactment of this Act, the United States—

(1) exercises its jurisdiction over United States citizens and vessels, and foreign persons and vessels otherwise subject to its jurisdiction, in the exercise of the high seas freedom to engage in exploration for, and commercial recovery of, hard mineral resources of the deep seabed in accordance with generally accepted principles of international law recognized by the United States; but

(2) does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed.<sup>56</sup>

Subsections (1) and (3) of section 102(b) provide as follows:

(b) **NATURE OF LICENSES AND PERMITS.**—(1) A license or permit issued under this title shall authorize the holder thereof to engage in exploration or commercial recovery, as the case may be, consistent with the provisions of this Act, the regulations issued by the Administrator to implement the provisions of this Act, and the specific terms, conditions, and restrictions applied to the license or permit by the Administrator.

(3) A valid existing license shall entitle the holder, if otherwise eligible under the provisions of this Act and regulations issued under this Act, to a permit for commercial recovery. Such a permit recognizes the right of the holder to recover hard mineral resources, and to own, transport, use, and sell hard mineral resources recovered, under the permit and in accordance with the requirements of this Act.<sup>57</sup>

<sup>54</sup> Note 1 *supra*, 14 ILM at 53.

<sup>55</sup> See WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED) 1438 (1971), where the following definition is given: "Miner's right: a license given to Australian miners to explore for and extract a mineral (as gold)"; and BLACK'S LAW DICTIONARY 897 (special deluxe 5th ed. 1979), where it states: "Mineral right. An interest in minerals in land. A right to take minerals or to receive a royalty."

<sup>56</sup> 94 Stat. 553, 555 (1980), 30 U.S.C. §1402 (1982).

<sup>57</sup> 94 Stat. 553, 558 (1980), 30 U.S.C. §1412 (1982).

These provisions clearly do not vest the minerals covered by the authorization of commercial recovery in the licensee or permittee whilst they remain *in situ*. Ownership passes to the licensee when they are "recovered," that is, separated from the seabed. His rights are protected against interlopers by the exclusiveness of his personal privilege to win the resources to be found in the licensed area.

#### VI. THE SPITZBERGEN ANALOGY: A POSSIBLE SOURCE OF CONFUSION

Prior to the Treaty of Paris of 1920,<sup>58</sup> in which the nine original signatory states quitclaimed whatever inchoate territorial claims they may have had in Spitzbergen through the operation of their companies from the United States, Scotland, Norway, Russia and Germany, respectively, those enterprises were perceived as having established what their home governments regarded as miners' rights: exclusive, incorporeal rights to mine coal within defined tracts.<sup>59</sup> Although the Island of Spitzbergen was *terra nullius* prior to the 1920 Treaty, two points should be observed. Miners did not establish rights of territorial title or ownership, but rather exclusive privileges to mine mineral tracts; these privileges were held to be, and were protected as, "exclusive" and "vested" rights.

Secondly, aside from the question of *terra nullius*, the island's legal status was unique in many ways. Its special status arose from the combination of the "standoff" among the competing inchoate territorial claims of sovereignty by the interested states and the reciprocal recognition of resource-winning activities by the citizens of those and other states. There was reciprocal recognition of mining claims that had been filed by all the miners with the foreign office of their country of nationality; as a result of this recognition, a special regime had come into being.<sup>60</sup>

#### *Exclusive Rights*

There are many evidences that a special international juridical regime governed mining activities on the island and permitted the acquisition of exclusive miners' rights. For example, in his Message to Congress of

<sup>58</sup> Feb. 9, 1920, 43 Stat. 1892, TS No. 686, 2 LNTS 7, 18 AJIL Supp. 199 (1924). The nine signatory states were: the United States, Great Britain, France, Italy, Japan, Denmark, the Netherlands, Norway and Sweden. Russia protested against this agreement, as it had not been consulted despite its historic claims to the archipelago. In 1924, however, Russia informed the Norwegian Government that it would recognize Norway's sovereignty over Spitzbergen. Letter from the Norwegian Minister (Bryn) to the Secretary of State, Mar. 20, 1924, [1924] 1 FOREIGN RELATIONS OF THE UNITED STATES 1.

<sup>59</sup> A history of these mining claims is given in Goldie, *A General International Law Doctrine for Seabed Regimes*, 7 INT'L LAW. 796, 807-11 (1973). See also Goldie, *Mining Rights and the General International Law Regime of the Deep Ocean Floor*, 2 BROOKLYN J. INT'L L. 2 (1975). In addition, a selection of key documents from the National Archives of the United States that relate to the U.S. interest in Spitzbergen are held on file by the author.

<sup>60</sup> Goldie, Symposium, *Mining the Deep Seabed: A Range of Possibilities (Symposium)*, Response to Lawrence Herman, 6 SYRACUSE J. INT'L L. & COM. 186, 187 (1978-79) [hereinafter cited as Symposium]. See also Goldie, *supra* note 40, at 293, 330-31.

December 7, 1909, President Taft reported on an invitation he had received to participate in a conference at Christiania (now Oslo) on the future of Spitzbergen and the Svalbard Archipelago. He endorsed the rights of the American mining company (the Arctic Coal Co.) on Spitzbergen and declared them to be "vested" and under the protection of the United States:

The Department of State, in view of proofs filed with it in 1906, showing American possession, occupation and working of certain coal-bearing lands in Spitzbergen, accepted the invitation under the reservation above stated [i.e., the question of altering the status of the islands as countries belonging to no particular state and as equally open to the citizens and subjects of all states should not be raised] and under the further reservation that all interests in those islands already vested should be protected and that there should be equality of opportunity for the future.<sup>61</sup>

The President's reference to "interests . . . already vested" is distinguishable from the discredited "vested rights" theory in the conflict of laws. It is a term not of theoretical explanation but of legal ascription. It sets the conditions for the acquisition, by private individuals, of established (as distinct from contingent or dependent) rights in areas and territories beyond the sovereignty of recognized international persons. These rights (or, more accurately, exclusive privileges), moreover, were seen as "vested" or "acquired" under the rules of general public international law governing states' personal jurisdiction over their nationals, and on the basis of each individual's claim to the protection of the state of his nationality. The states involved in the regime that emerged thus mutually recognized themselves as being entitled to vindicate their own citizens' exclusive privileges of unimpeded resource winning. So fully established and protected had these rights (or privileges) become that, under the Treaty of Paris of 1920, these were seen as effectively opposable to the state (namely, Norway) to which a limited species of territorial sovereignty was accorded.

In this way, the 1920 Treaty testifies to the recognition of the prior existing miners' "acquired rights" (i.e., exclusive privileges), rights that had vested before the Norwegian acquisition of sovereignty over the whole Svalbard Archipelago. Articles 2, 6 and 7 explicitly preserved the previously acquired exclusive mining rights (i.e., privileges) as well as liberties of hunting and fishing.<sup>62</sup>

<sup>61</sup> Annual Message of the President to Congress, Dec. 7, 1909, 1909 FOREIGN RELATIONS OF THE UNITED STATES at ix, xiii (1914 ed.).

<sup>62</sup> Those provisions read as follows:

*Article 2*

Ships and nationals of all the high contracting parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.

Norway shall be free to maintain, take or decree suitable measures to insure the preservation and, if necessary, the re-constitution of the fauna and flora of the said

The annex referred to in Article 6 mentions the "claims" of nationals of the high contracting parties having "acquired rights" in the regions. The word "claims" may seem ambiguous, as at least two possible and distinctly different meanings could be read into it. The first is that it indicates nothing more than a "demand for something as due, an assertion of a right to something."<sup>63</sup> Alternatively, it could connote "*spec. in U.S. and Australia* a piece of land allotted and taken, esp. for mining purposes."<sup>64</sup> It appears from the history both of mining on Spitzbergen and of states' protection of their nationals' claims,<sup>65</sup> as well as from the context of the annex itself, that the term is used in the Treaty in the accepted and traditional mining sense of indicating the areas within which miners and prospectors exercised their miners' or mineral rights rather than as signifying mere assertions of inchoate and subjective demands. Norway's function under the annex should thus be seen as transforming personal into territorial rights and as establishing greater security and merchantability of those rights.

Finally, the United States Government quite practically viewed the rights that the Arctic Coal Co. had acquired in Spitzbergen as having been sufficiently established to be the subject of an international arbitration

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regions, and their territorial waters; it being clearly understood that these measures shall always be applicable equally to the nationals of all the high contracting parties without any exemption, privilege or favor whatsoever, direct or indirect to the advantage of any one of them.

Occupiers of land whose rights have been recognized in accordance with the terms of Articles 6 and 7 will enjoy the exclusive right of hunting on their own land; (1) in the neighborhood of their habitations, houses, stores, factories and installations, constructed for the purpose of developing their property, under conditions laid down by the local police regulations; (2) within a radius of 10 kilometres round the headquarters of their place of business or works; and in both cases, subject always to the observance of regulations made by the Norwegian Government in accordance with the conditions laid down in the present article.

#### Article 6

Subject to the provisions of the present article, acquired rights of nationals of the high contracting parties shall be recognized.

Claims arising from taking possession or from occupation of land before the signature of the present treaty shall be dealt with in accordance with the annex hereto, which will have the same force and effect as the present treaty.

#### Article 7

With regard to methods of acquisition, enjoyment and exercise of the right of ownership of property, including mineral rights, in the territories specified in Article 1, Norway undertakes to grant all nationals of the high contracting parties treatment based on complete equality and in conformity with the stipulations of the present treaty.

Expropriation may be resorted to only on grounds of public utility and on payment of proper compensation.

18 AJIL Supp. at 201, 203.

<sup>63</sup> 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 451 (1971).

<sup>64</sup> *Id.*

<sup>65</sup> See note 55 *supra* and notes 66-68 and accompanying text *infra*.

as to the boundaries of the American enterprise's "tract" with the tract of a Norwegian citizen (Hjorth).<sup>66</sup> Furthermore, the position of the United States, even prior to 1920, was that opening coal mines within the Arctic Coal Co.'s tract and the tracts "belonging" to Messrs. Ayer and Longyear, and removing boundary markers from them were tantamount to (to quote Messrs. Ayer and Longyear's hyperbolic and metaphorical use—or rather misuse—of the English language) "trespasses"<sup>67</sup>—despite the technical common law connotation of the term. Be that as it may, in the negotiations for establishing a regime governing Spitzbergen, the United States again referred to "claims . . . recorded in the Department of State at Washington":

[T]he Government of the United States finds that for the present it cannot give its adherence to any convention for the government or administration of order in Spitzbergen which, while pronouncing upon the validity of claims to land in Spitzbergen, does not recognize the indisputable validity of the claims of its citizens as recorded in the Department of State at Washington.<sup>68</sup>

While the formulation of what the United States was espousing may seem ambiguous, the protected "claims" may be characterized as exclusive usufructuary rights that had become vested through the mutual recognition of the personal rights of the nationals of the reciprocating states, and of those states' personal jurisdiction over their miners, despite the location of the resources on Spitzbergen while it remained *terra nullius*.

#### *Res Nullius/Res Communis—An Irrelevant Dichotomy*

Of course, there are many differences between reciprocal rights in Spitzbergen prior to the Treaty of Paris of 1920 and on (or under) the high seas. But, as with the high seas and other commons, while no state could exercise territorial sovereignty over Spitzbergen, the citizens of

<sup>66</sup> See, e.g., letter from Peirce (U.S. Minister to Norway) to Norwegian Minister of Foreign Affairs Irgens, Apr. 30, 1910, 2 American Legation in Christiania, Spitzbergen Correspondence, Department of State Record Group 59; Note verbale from Department of State to Norwegian Foreign Minister, Jan. 13, 1911, Case No. 850d.00/154, 2 American Legation in Christiania, Spitzbergen Correspondence, Department of State Record Group 84.

<sup>67</sup> This technical common law term arose in the U.S. diplomatic correspondence. See letter from Third Assistant Secretary Peirce at the American Legation, Christiania, to Secretary of State Knox, July 30, 1909, and Diplomatic Protest of same date from U.S. Legation to the Minister of Foreign Affairs of Norway, Transaction No. 3746, 346 Numerical File, Department of State Record Group 59. This writer suggests that, despite appearances to the contrary, the Department of State did not intend the term to be treated with all the technicalities of the common law concept of trespass. To have done so would have resulted in unnecessary confusion. Trespass *quare clausum fregit* might be seen as inapplicable, since miners' rights are generally viewed as *jura in re aliena*, not *jura in re propria*. Technically, the trespass would be *de bonis asportatis*. But this, too, presents difficulties. Hence, no more appears to be intended than the traditional common language or even the biblical sense of the word, not the legalistic remedy of the old common law writ system.

<sup>68</sup> Note verbale from Secretary of State to Norwegian Minister, Jan. 14, 1911, 2 American Legation in Christiania, Spitzbergen Correspondence, Department of State Record Group 84.

every state that participated in the regime of reciprocal recognition of miners' rights described above could exploit the coal measures, sea mammals and birds of the archipelago in a way that tended to resemble human exploitation of the resources of the high seas. In addition, as with the high seas, each state only exercised personal jurisdiction over its own citizens and their activities—negating any concept of territoriality. On the other hand, good merchantable title was recognized as having been obtained over the commodities that individuals had acquired there through mining and hunting.

Critics of the "Spitzbergen Analogy" ignore official statements of the kind already quoted from President Taft and the Department of State. They find solace in a broad reading of Fred K. Nielsen's evaluation of the rights assured by the Treaty of Paris in his widely quoted and cited article in the *American Journal of International Law* on the "solution" of the Spitzbergen question. He wrote:

In this annex to the treaty is found an interesting and important precedent. Of course, it cannot be regarded as a precedent of importance in its possible future application to private rights in lands having the status of *terra nullius*. But it is important to the persons who have been the pioneers in the development of the natural resources of Spitzbergen. The provisions of the annex properly accord international recognition to rights which have heretofore been legally undefined, since, of course, claimants to land in a *terra nullius* could have no title under municipal laws where such laws did not exist, and since such rights were evidently not defined by any generally recognized principle of international law. Norway as the future sovereign authority in the archipelago, is obligated to give effect by appropriate municipal enactment to such international recognition of private rights.<sup>69</sup>

<sup>69</sup> Nielsen, *The Solution of the Spitzbergen Question*, 14 AJIL 232, 234-35 (1920). See also Lansing, *A Unique International Problem*, 11 AJIL 763, 769 (1917), where the author (later Secretary of State) expressed the following point of view:

In these circumstances a real right, in the common acceptance of the term, cannot exist in Spitzbergen. Restrictions upon the use and occupancy of land [there] must not depend upon the government's having control over the *land* used or occupied, but upon control over the *persons* who might freely occupy and use it if not restrained in their acts. The result of control in both cases would be almost, if not quite, identical, although the exercise of control would arise from principles entirely different. The essential feature of ownership is the exclusion of all others from the use and enjoyment of the thing owned. This is equally true of personal and real property. Ownership in the case of land in Spitzbergen could not, therefore, exist. All persons cannot be excluded. Only those persons could be excluded whose governments have conferred upon the insular government the right to exclude them. Exclusive use and occupancy is lacking, and so land in Spitzbergen cannot, in the true sense, be owned.

If, however, the governments of the world should with substantial unanimity agree that their respective nationals might by direction of the government formed by them for Spitzbergen as their common agent be excluded from the occupancy and use of land unless specially privileged to do so, the effect would be similar to that resulting from ownership, although it would lack the permanency of a right based on territorial sovereignty, for it would be liable to the invasion of nationals of a Power which had not conferred any portion of its political sovereignty upon the government established. In the case of ownership, the right of exclusion is complete and is derived from exclusive

Can this statement be reconciled with that in President Taft's Message to Congress<sup>70</sup> and with the official U.S. position regarding the Spitzbergen negotiations prior to World War I?<sup>71</sup> The answer is clearly in the affirmative. Mr. Nielsen's statement can be reconciled both with the observation of the Department of State regarding its view that a treaty settling the public law status of Spitzbergen should recognize the "indisputable validity of the claims" of American citizens "as recorded" with it and with President Taft's Message to Congress of December 7, 1909 (which viewed those rights as "already vested"), if these rights which were seen as protectable by the United States Government are viewed as *in personam*. They were characterizable as usufructuary privileges that existed, in the first place, by virtue of the laws of the miners' own various nationalities, and, in the second place, through the reciprocal regime by which each state recognized the miners' rights of all the others in consideration of their recognition of its conferral of its own citizens' personal rights. That is, rights may be viewed as existing with regard to winning minerals (and other resources) on Spitzbergen prior to 1920 because each of the participating states recognized the personal rights of the citizens and subjects of all the others. This derivation of the miners' rights renders irrelevant the issue of the absence of local territorial sovereignty over the island prior to the 1920 Treaty.

The existence and reciprocal recognition of this personal jurisdiction explains why the citizens of each state filed their claims to exercise mining rights with the foreign office of the state of their own nationality. This writer's imaginary dialogue in the Symposium, to which Professor Sohn and his associate, Ms. Kristen Gustafson,<sup>72</sup> make reference, pointed to the

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control of the land; in the case of the right acquired in Spitzbergen, the right of exclusion would be incomplete and would be derived from the delegated power to control persons of certain nationalities who might otherwise enter upon the land.

<sup>70</sup> See text at note 61 *supra*.

<sup>71</sup> See text at note 68 *supra*.

<sup>72</sup> See note 50 *supra* and accompanying text. This writer's imaginary dialogue, in his Comment, *Customary International Law and Deep Seabed Mining*, 6 SYRACUSE J. INT'L L. & COM. 173, 179 (1978-79), was as follows:

The practical men who established, and bought and sold, and made money out of their mining tracts on Spitsbergen took a different view of their rights from that of the positivists. They were guided by the utility of internalizing the externalities of taking coal from economically-sized tracts. Accordingly, before 1920 they established a regime whose basic agreement ("social contract") may be summarized as follows:

"This is my tract because I am working it."

"That is your tract because everybody is working theirs the way you and I are working our separate tracts."

"That other has no tract, he is stealing."

"If he operates outside the regime then their governments will speak to his."

"If their governments refuse to speak or if his neglects the representations of theirs will the game be at an end?"

"That is a matter of choice, every legal order can be put to an end by agreement or be violently overthrown."

The power of a legal order to enforce or protect rights may be a social necessity, but it is not a legal or logical necessity. The legal order itself is, after all, the arrangement



implicit understanding, the "social contract," arising from the reciprocal recognition by the participating states, of the miners' rights. These privileges and consequential titles to goods once severed (but not to the land) were among the specific characteristics of Spitzbergen's legal status prior to the Treaty of Paris of 1920 that this writer relied on in his advice on the drafting of the Deepsea Ventures Notice of Claim. Furthermore, that same Treaty of Paris preserved other aspects of the prior regime, for example, the protection of "acquired rights," the preservation of the freedom to hunt and fish, and the restraints on Norway's power to tax.

Because the regime involved the reciprocal recognition of personal rights, it was not relevant to argue that the lack of territorial sovereignty rendered all rights to mine on Spitzbergen nugatory. This would only have been true if the asserted claims were rights to title over tracts of land, i.e., territorial property, and not merely to exercise privileges of exclusive use. It should be remembered that where claimants asserted more than rights of use, they may have been motivated by the exigencies of advocacy (or blinded by faulty hyperbole) to inflate the nature of their claims. Such an inflation should not blind subsequent analysis into indulgent agreement (which would, in the long run, discredit the claims). Rather, such a redefinition should require that claimants strictly adhere to what the law allows. Surely, this explains why, even after 1920, when Norway was accorded sovereignty under what may be viewed as an imperfect public international law analogy to a quitclaim deed, Norway's sovereignty was restricted by the "grandfather" rights acquired prior to 1920.

### *A Misplaced Criticism*

Professor Steven J. Burton, in an article in the *Stanford Law Review*,<sup>73</sup> asserts that some commentators have argued that private mining concerns held exclusive rights to land containing coal deposits on Spitzbergen Island when that island was *terra nullius* (the land of no one), and that this "precedent" suggests by analogy that rights could be held by private mining concerns with respect to deep seabed hard minerals.<sup>74</sup> Here, again, is the only too common fallacy of confusing territorial and personal jurisdiction and of confusing rights of territorial property—"broad acres"—with rights of use.

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whereby rights can be created or distributed. The question of enforcement is simply not one of validity, but one of effectiveness [footnotes omitted].

This writer also pointed out, *id.* at 178-79 n.15, that writers such as Burton are, in effect, the prisoners of their own definitions. See the following passage from that footnote:

The question of determining the existence of property rights depends on the definition of property, and of the legal order establishing that definition, a language game. If a person stipulates an Austinian [i.e., territorialist] definition of property he will deny the existence of property outside the existence of the Austinian order—the sovereign state as the premise of laws. But the conclusion is tautologous: it is inherent in the premise if he accepts some other definition, . . . the sovereign state may not be essential.

<sup>73</sup> Burton, *supra* note 50.

<sup>74</sup> *Id.* at 1146 n.44.

Given this irrelevant premise, Professor Burton was able to criticize this writer's use of the Spitzbergen analogy on the ground that title to land could only be acquired through essential action by Norway, "which had acquired sovereignty over Spitzbergen by virtue of that treaty [i.e., the Treaty of Paris of 1920]."<sup>75</sup> But this assertion misperceives the character of the Spitzbergen analogy. That analogy was used to indicate the usufructuary privileges of the miners to take a resource. It did not assert any right to stake out a territorial title, certainly not a title to broad acres. Like those of other critics, Professor Burton's misconception is the product of the all too frequently met confusion between title and use, a confusion that survives today in denunciations of the U.S. Deep Seabed Hard Minerals Act as colonialist, territorialist and imperialist. As has been argued at length, the object of that Act is to regulate, through the exercise of in personam jurisdiction, the activities of American citizens and enterprises with respect to the bed of the free high seas and so contribute to the conservation of the oceans' commons.

#### VII. RIGHTS TO USE AND TO WIN "FRUITS"

An example from United States domestic law further testifies in support of this Comment. In *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*,<sup>76</sup> a federal appellate court affirmed an injunction prohibiting "free rider" defendants from interfering with the plaintiff's recovery operations and from removing treasure from an abandoned wrecked ship found by the plaintiff and actively exploited by him. The court so ruled even though the plaintiff could not have been said to have gained physical control, let alone legal possession, of the whole ship or of the whole of her cargo. Here the idea of permitting an exclusive right so as to make reasonable use of the resource as a definitive collectivity (i.e., the wreck and its contents) supported the idea of a right to exclude "free riders" without giving any allodial, freehold or similar ownership title over the subjacent seabed. All that was given was an exclusive license protected by injunctive relief. This is all that has been argued for in the cognate maritime context of deep seabed mining.

#### VIII. CONCLUDING OBSERVATIONS

The thesis of this Comment has been a simple one. First, and merely as a *mise en scène* to the characterization of the relevant rights that may be asserted under customary international law, it has pointed to the alternative interpretations of the phrase "common heritage of mankind." While one of the competing interpretations, that of equal and common access, is clearly congruent with the contemporary customary international law of the sea, its opposite, involving a centralized enclosure, calls for a fundamental change in contemporary international law. Bearing in mind the accepted base value that the consent of states is crucial to their assuming

<sup>75</sup> *Id.*

<sup>76</sup> 640 F.2d 560 (5th Cir. 1981).

new obligations, disabilities or exclusions, the argument has been urged that the route to central enclosure of the deep ocean floor and its resources is through treaty law; for example, through the acceptance of part XI and Annexes III and IV of the UN Convention on the Law of the Sea as binding. Publicists who claim that Article 1 of the 1970 Declaration of Principles has already effectuated a central enclosure are preaching a hazardous doctrine that states may, merely through their participation in international organizations, conferences and negotiations, find themselves called upon to bear obligations and to suffer the curtailment of their freedom of choice without their consent.

The argument in this Comment should not be viewed as an attack on the equities sought by the proponents of central enclosure. It does, however, raise two fundamental questions. The first is whether alternative methods of organization can achieve those equities, and the second, whether it is prudent, given the volatility and fragility of the present international legal order, to seek to impose important obligations on unwilling states that at the moment do not see any national advantage in accepting them. Furthermore, in a world where most states are committed to seeking their individual national advantage, or the advantage of whatever ideology they are committed to, other nations are not encouraged to pursue a policy of sacrificing their own national goals to the dictation of what may well prove to be a transient majority of states.

Until the Law of the Sea Convention is effectively accepted, and with it, the principle of the central enclosure, the seabed area beyond national jurisdiction will continue to be, as it heretofore has been, the common heritage of mankind in the sense that it cannot be appropriated, nor can exclusive territorial rights be acquired over it. On the other hand, in 1970 there was sufficient agreement that a minimum effect could be given to the slogan of Article 1 of the Declaration of Principles. This effect is the interdiction of claims of territorial *imperium* or *dominium* over any part of the Area. But, as traditionally claimed, rights to win and exploit resources remain.

The privileges of exploration and exploitation are presented as being usufructuary, not territorial, in character. Their protection under contemporary international law lies in the personal jurisdiction of the states of nationality of the relevant enterprises. The issue of territoriality, of both *imperium* and *dominium*, is irrelevant. The usufructuary enjoys his privilege without needing to assert any titular right to the seabed adverse to the common heritage of mankind and, finally, may take mineral resources therefrom in his capacity as a participant in and beneficiary of that common heritage.

One final thought is that the clear perception of mining rights in the seabed as usufructuary and as less than involving title to seabed tracts may well prove a fruitful basis of legal evolution, even in the absence of the entry into force of the Law of the Sea Convention. Stressing the relativistic and specific nature of a mining right as no more than a usufruct gives grounds for asserting the coexistent, indeed transcendent, rights of the

world community. Furthermore, it should be recalled that the states that voted for the 1970 Declaration of Principles did not differ to any significant degree over the ideas of distributive justice and equity as formulated in Articles 2-15, namely, the principles of shared benefits,<sup>77</sup> cooperative research, conservation, environmental protection and special benefits for developing countries. A claim to the use and the fruits only may not, per se, be tantamount to a vow of poverty; but since it does acknowledge other, parallel, claims and coexisting rights, it calls for restraint and abstention arising from a necessary acquiescence in other uses and in paramount titles.

L. F. E. GOLDIE\*

### CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed.

TO THE EDITOR IN CHIEF:

February 20, 1985

The article *Of Gnats and Camels: Is There a Double Standard at the United Nations?* by Professor Thomas M. Franck in the October 1984 issue (at p. 811) constitutes an enlightening analysis of the criticism currently leveled against the United Nations that the Organization practices double standards. I fully agree with Professor Franck that a close examination of UN proceedings and decisions produces a picture which is more complex and more nuanced than is generally portrayed by the constant critics of the United Nations. The article also brings out quite aptly that most of the UN fora are political bodies and that these fora cannot be judged by standards of equal justice. All the same Professor Franck argues that particularly in human rights matters, there is a great deal of substance in the charge that the United Nations is applying selective and unequal criteria. It would appear that pronouncements and actions tend to be harsher when human rights violators belong to the capitalist camp, while violators who are members or associates of the Soviet-dominated group are treated with more benevolence. To this end, Professor Franck relies quite heavily on the cases of Chile and Poland.

The evidence cited by Professor Franck on Chile and Poland produces quite a convincing picture. Both the General Assembly and the Commission on Human Rights have taken over the years a strong stand against the Chilean military dictatorship and against the gross violations of human

<sup>77</sup> For example, the principle of "shared benefits" is reflected in sec. 403 of the Deep Seabed Hard Mineral Resources Act, 94 Stat. 584 (1980), 30 U.S.C. §1472 (1982), which provides for the "establishment" of a "Deep Seabed Revenue Sharing Trust Fund."

\* Professor of Law and Director, International Legal Studies Program, Syracuse University College of Law. This paper was presented as a lecture at the Instituto di Diritto Internazionale, "D. Anzilotti," University of Pisa.

rights perpetrated by that regime. Detailed and strongly worded reports have provided the basis for UN actions. This firm attitude regarding Chile contrasts with the handling of the serious human rights situation in Poland following the proclamation of martial law in that country in December 1981. UN reports on Poland were cautious and timid and resulted in 1984 in the adoption of a motion by the Commission on Human Rights to take no decision on the matter.

However, leaving aside for practical purposes the question whether from a human rights perspective the Chilean and Polish cases are fully comparable and assuming for the sake of argument that both situations are very similar, some facts which were not highlighted by Professor Franck deserve further attention. These facts present a more complete and complex picture of the handling of the two cases than the article would suggest.

It is historically not fully correct to assume that UN organs jumped on the Chilean situation immediately after the overthrow of the Allende Government in September 1973. The General Assembly, meeting in the fall of that year, did not take any action regarding the Chilean situation and it was only in the course of 1974 that UN organs, such as the Commission on Human Rights and its Sub-Commission, the Economic and Social Council and the General Assembly, became seized with the matter. The initial action taken by the Commission on Human Rights in 1974 was rather limited and modest. The Commission authorized its Chairman to address a cable to the Chilean military authorities as mentioned in Professor Franck's article. Although suggestions were put forward at the 1974 session of the Commission to take the more far-reaching action of establishing fact-finding machinery, the Commission was not yet ready to follow that course and it was only in 1975 that the Commission decided to create a working group to investigate the Chilean situation. The Soviet Union and its allies at the time went along with this decision after lengthy negotiations and with the greatest reluctance. Fact-finding procedures are generally not favored by the USSR and, perhaps more importantly, the decision looked at variance with a long-standing Soviet position to the effect that the competence of the United Nations to deal substantively with violations of human rights should be restricted to situations which affect international peace and security. In fact, the situations in southern Africa and in the Israeli occupied territories fell within that category, but the Chilean situation was never qualified in terms of affecting international peace and security. The Soviet Union might well have realized that in its agreeing to a UN investigation into Chile and thus abandoning in the Chilean case its thesis that UN investigative action in human rights matters should be limited to situations involving international peace and security, the door might be opened for UN investigations into a whole range of other situations. And, indeed, that gradually and progressively has happened since 1975. Professor Franck gives a review of those situations in relation to the 1983 session of the Commission on Human Rights. A full analysis of UN human rights proceedings in the years prior to 1983 would reveal that since the Chilean case was taken up, an increasing number of other situations in various continents became the subject of UN public scrutiny and monitoring, albeit in a less forceful manner than in the Chilean case. I would submit that the Chilean case served as a breakthrough inasmuch as it triggered off, wittingly or unwittingly, a development towards a broader and less selective UN public involvement in human rights violations.

Turning now to the Polish case as it came up after the events of December 1981 and the ensuing serious violations of human rights, it is true that the membership of the Commission on Human Rights was sharply divided, and that the General Assembly was never seized with the case. However, within a few months after the events (on 10 March 1982 and not as late as 1983) the Commission did express its deep concern at widespread violations of human rights in Poland and decided to request the Secretary-General or a person designated by him to undertake a thorough study of the human rights situation in Poland and to present a comprehensive report to the Commission at its 1983 session.

I fully agree with Professor Franck that the reports presented on behalf of the Secretary-General by the Under-Secretaries-General Gobbi and Ruedas to the 1983 and 1984 sessions of the Commission on Human Rights largely contrast in tone and contents with most of the reports prepared by rapporteurs and working groups on other human rights situations and notably on Chile. In this connection it needs to be stressed that, insofar as the Chilean and Polish cases provide evidence of a "double standard," the respective investigators had a completely different perception of their role. While the investigators into the Chilean situation were mainly mindful of their function and the objective to present the hard human rights facts on the basis of all available and reliable evidence, the UN Secretary-General in approaching any human rights situation, including that of Poland, would tend to take other considerations into account than those exclusively related to human rights. A straightforward public stand by the Secretary-General on a particular human rights situation may very well jeopardize his other functions vis-à-vis the country concerned and his role as a negotiator and conciliator. This may partly explain the timidity of the two reports on Poland which were, in the appreciation of some interested observers, no less than a whitewash. In a way, the Secretary-General was caught in a dilemma between a particular human rights function entrusted to him by the Commission on Human Rights and the general diplomatic and political functions inherent in his office. The two UN reports on Poland clearly demonstrate that the Secretary-General had to make compromises in the face of that dilemma. But even if one duly recognizes the Secretary-General's dilemma, this cannot confuse the clear impression that the human rights mandate entrusted to the Secretary-General by the Commission on Human Rights was not carried out expeditiously and properly. Already some procedural facts may speak for themselves. The Commission adopted the relevant resolution concerning Poland on 10 March 1982 (later confirmed by the Economic and Social Council on 7 May 1982), but it was with great delay, not earlier than on 21 December 1982 when the next session of the Commission was imminent, that the Secretary-General announced that he had designated Under-Secretary-General Gobbi as his representative (UN Doc. E/CN.4/1983/16, para. 4). This is certainly no proof of an active and urgent interest of the Secretary-General in the Polish case. Leaving the Gobbi report for what it was, the report presented in 1984 by Under-Secretary-General Ruedas was in many respects highly amazing. It squarely stated that the Secretary-General had not found it possible to give full effect to the mandate entrusted to him, viz., to update and complete the thorough study of the human rights situation in Poland and to present a comprehensive report to the Commission (UN Doc. E/CN.4/1984/26, para. 13). The reason adduced for the failure to give full effect to the mandate was

the separation of Under-Secretary-General Gobbi from UN services and the subsequent need for his replacement. In my view this argument is neither valid nor convincing. The Secretary-General has the primary and ultimate responsibility that tasks entrusted to him be carried out effectively. He cannot help it if governments fail to cooperate, but changes within his own staff may not be legitimately adduced as a reason for inadequate performance of duties.

While it cannot be denied that many member states of the United Nations practiced a "double standard" in their appreciation of the cases of Chile and Poland, the Secretary-General's role in the Polish case was a dubious one inasmuch as he prepared in his reports a suitable ground for virtually dropping the matter. It is not difficult to understand the delicate position of the Secretary-General but, taking into account the particular human rights mandate he had received, I would not go so far as Professor Franck to attribute to the Secretary-General a certain degree of resourcefulness and courage in the Polish case.

It is significant and revealing that the current "double standard" debate in which the United States plays such a vocal role, serves essentially political and ideological purposes in the context and the ramification of East-West rivalries. That debate scarcely focuses on other apparent discrepancies and inconsistencies in the handling of human rights situations. A glaring and troubling case in point was the situation in Argentina under the military dictatorship after 1976. While forceful UN action was largely targeted on Chile, neighboring Argentina with a degree of terror and a level of gross violations of human rights going well beyond Chilean proportions, never figured explicitly on the human rights agendas of the United Nations. It was only by way of indirect action, through the adoption of resolutions on the general issue of enforced or involuntary disappearances and the creation of a working group with a global mandate for "disappeared" persons, that the Argentinean situation could be tackled. For an in-depth analysis of the "double standard" issue, a comparison between the Chilean and Argentinean cases seems to be at least as pertinent as a comparison between the Chilean and Polish cases.

As a final remark I would submit that, even if it is true that the United States has within its own constitutional domain a strong sense for and commitment to equal protection and fair standards of justice, the standards practiced by the present United States administration in assessing human rights violations in other nations are by no means less political and less biased than the standards applied by the majority of the UN membership.

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#### *Act of State and the Restatement*

#### TO THE EDITOR IN CHIEF:

Professor Halberstam does not like the act of state doctrine, and thinks the reporters of the *Restatement* shouldn't either.<sup>1</sup> She thinks the present

<sup>1</sup> Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AJIL 68 (1985).

members of the U.S. Supreme Court, or most of them, would not say what the Court said in *Sabbatino* in 1964. Whether or not this is true we have no way of knowing. Even if it were true, the same could probably be said about other decisions of the Court—*Miranda*, for instance, possibly *Baker v. Carr*, perhaps *Engel v. Vitale*. One would not suppose, however, that the drafters of a *Restatement* should proceed on the assumption that those cases are not current law. The evidence is strong that the present Supreme Court, if not unanimously in agreement with Justice Harlan's opinion of 1964, is not so disturbed about it as to overcome the Court's commitment to *stare decisis*.

Of course, if we thought the act of state doctrine was a passing phenomenon, an approach to the function of courts whose time had passed or was about to pass, we should have devoted less space to it. We think the doctrine will continue to be controversial, but probably not disappear—whatever the *Restatement* might say or not say. In the first place, the doctrine was enunciated by the U.S. Supreme Court almost 90 years ago, and has been upheld by each generation of the Court that has considered it. As doctrines go—particularly doctrines that depend neither on the command of the Constitution nor on a mandate from Congress—that is a fairly sturdy record. Second, it is instructive that after the *Dunhill* case<sup>2</sup> was argued to the Supreme Court in the spring of 1975, the Court put the case over for reargument and invited the parties (and the Solicitor General) to address the question "Should this Court's holding in . . . *Sabbatino* be reconsidered?"<sup>3</sup> Neither the parties nor the Solicitor General took up the invitation.<sup>4</sup> Justice White, who had dissented so vehemently in *Sabbatino*, was content to write for the plurality in *Dunhill* about particular facts and to propose a commercial exception to the doctrine.<sup>5</sup> Again, in the recent *Bancec* case,<sup>6</sup> the Court might have said the doctrine no longer appeals to it; instead, it addressed the question of piercing the corporate veil of state-owned enterprises in the context of a counterclaim for setoff.

Professor Halberstam seems to fear that the new *Restatement* has come to the rescue of a doctrine that without such effort would soon collapse. Our impression is rather the opposite: The courts, by and large, seem content with the act of state doctrine, with some limitations—notably the territorial limitation<sup>7</sup> and a limitation with respect to counterclaims for setoff.<sup>8</sup> The American business community is far from united in opposition

<sup>2</sup> *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

<sup>3</sup> See 422 U.S. 1005 (1975).

<sup>4</sup> The State Department's Legal Adviser, Monroe Leigh, wrote a separate communication, stating that the Department would not anticipate embarrassment to the conduct of the foreign policy of the United States if the Court should decide to overrule the holding in *Sabbatino*. This position was not, however, incorporated into the brief of the Solicitor General.

<sup>5</sup> Justice Powell, who had said in *First National City Bank of New York v. Banco Nacional de Cuba*, 406 U.S. 759, 774 (1972) (Powell, J., concurring), that he disagreed with the Court's opinion in *Sabbatino*, said so again in a one-paragraph opinion in *Dunhill*, but seems to have made no effort to win the Court to his view. 425 U.S. at 715.

<sup>6</sup> *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

<sup>7</sup> For the latest illustration of reliance on the territorial limitation, see *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985).

<sup>8</sup> See *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983); *First Nat'l City Bank of New York v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).



to what Professor Halberstam calls "this bizarre doctrine." Banks, for instance, have repeatedly relied on the doctrine, and have been disappointed when it was not applied to shield them from multiple liability.<sup>9</sup> As for the major oil companies, not only have they used the doctrine successfully themselves in various civil actions;<sup>10</sup> consider how the Seven Sisters would have reacted had the assault on the OPEC cartel in a U.S. district court not been deflected by invocation of the act of state doctrine.<sup>11</sup>

Opposition comes largely from those who opposed the doctrine long before *Sabbatino*. The arguments are not new; indeed, most of the quotations Professor Halberstam adduces are from the 1960s, except for one report of a committee of the New York City Bar Association, cited three times, that dates from 1959. Some of the opponents, whom Professor Halberstam now joins, would like (or would have liked) to have the *Restatement* help them to accomplish what they have been unable to accomplish through legislation or litigation.

Professor Halberstam accuses the reporters of the new *Restatement* of doing what Justice Harlan said he would not do—"adopting an all-encompassing rule."<sup>12</sup> We had not thought we were doing so. In any event, we have responded to the criticism that our black-letter formulation of the doctrine sounded too rigid. We have also responded to criticism from those who said we focused too much on taking of property, as well as from those who urged us to limit the section to taking of property. In the version placed before the American Law Institute in the spring of 1985, we took account of the fact that Justice Harlan, writing in the context of an expropriation, had drawn on the *Underhill* decision of 1897,<sup>13</sup> which involved a claim of wrongful arrest and detention. In the revised version, the black letter reads as follows:

Subject to a controlling act of Congress or international agreement, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.<sup>14</sup>

<sup>9</sup> Compare *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5 (1984) (act of state doctrine applied to relieve bank of liability on a certificate of deposit issued in Cuba) with *Garcia v. Chase Manhattan Bank*, 735 F.2d 645 (2d Cir. 1984) (act of state doctrine not applied because obligation deemed situated outside of Cuba). See also, e.g., *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1982) (act of state defense rejected and bank held liable to depositor at Saigon branch).

<sup>10</sup> See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983).

<sup>11</sup> *International Ass'n of Machinists & Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

<sup>12</sup> Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

<sup>13</sup> *Underhill v. Hernandez*, 168 U.S. 250 (1897).

<sup>14</sup> RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §469 (Tentative Draft No. 6, 1985). By comparison, §428, contained in Tentative Draft No. 4 (1983), read: "Subject to §429 [dealing with the so-called Hickenlooper Amendment], courts in the United States will refrain from examining the validity of an act of a foreign state taken in its sovereign capacity within the state's own territory."

As with other sections of the *Restatement*, 10 Comments and 13 Reporters' Notes elaborate on these terse phrases, describing the various exceptions and limitations to the doctrine that have grown up, some confirmed by the Supreme Court, others still in doubt.<sup>15</sup> It is in these interstices—exceptions, limitations and interpretations of the limitations—that the act of state doctrine in the United States seems to us likely to develop. The *Restatement* does not provide instant answers to the many issues that have arisen, but it provides a convenient—and we believe correct—point of departure for the courts, for advisers and for advocates.

We have attempted to report on the act of state doctrine, as on many other doctrines and puzzles in our field, as scholars and not as advocates. We have come neither to praise *Sabbatino* nor to bury it. There having been no burial, there can hardly have been a resurrection—with or without the *Restatement*.

LOUIS HENKIN  
ANDREAS F. LOWENFELD\*

TO THE EDITOR IN CHIEF:

March 20, 1985

In a review of the *Soviet Year-Book of International Law 1982*, published in your October 1984 issue (at p. 1018), Dr. E. T. Usenko is presented as a scholar "well known for his participation in the International Law Commission's work" (p. 1019). Knowing Professor Usenko's erudition and diplomatic skills, I have little doubt that, given a chance, he would ably represent the Soviet legal doctrine in that prestigious body. The fact remains, however, that since 1967 another recognized international lawyer—Professor Nikolai A. Ushakov—has been the Soviet member of the Commission. He is the fifth Soviet scholar to serve in this capacity. Vladimir M. Koretsky (1949–1952), Feodor I. Kozhevnikov (1952–1953), Sergei B. Krylov (1954–1956) and Grigory I. Tunkin (1957–1966) were his predecessors.

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#### THE FRANCIS DEÁK PRIZE

The Board of Editors of the *American Journal of International Law* announces with pleasure the selection of Michael J. Glennon as recipient of the Francis Deák Prize for 1985. The prize was awarded to Professor Glennon for his article, *The War Powers Resolution Ten Years Later: More*

<sup>15</sup> See, e.g., the exception for commercial transactions set forth in part III of *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695–706 (1976), concurred in by only four of the five Justices making up the majority in that case, but not by Justice Stevens.

\* Of the Board of Editors. Professors Henkin and Lowenfeld are, respectively, Chief Reporter and one of the associate reporters of the *Restatement of the Foreign Relations Law of the United States (Revised)*.

*Politics than Law*, which appeared in the July 1984 issue at page 571. The Deák Prize honors the memory of the late Francis Deák and recognizes an especially meritorious article contributed to the *Journal* during the previous year by one of its younger authors.

The Board of Editors expresses its gratitude to the Institute for Continuing Education in Law and Librarianship and its President, Mr. Philip F. Cohen, through whose generosity the recipient of the prize is granted an award.

#### AUTHOR'S CORRECTION

In his letter to the editors (79 AJIL 114 (1985)), Mr. Benjamin B. Ferencz states that Professor Schachter "doubts that [self-rule] is secondary to . . . the maintenance of peace." Mr. Ferencz has indicated that he intended to state that Professor Schachter "doubts that self-rule is superior to the maintenance of world peace." The exchange on this subject having engendered wide interest, the *Journal* has agreed, exceptionally, to facilitate clarification.

# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH\*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

## JUDICIAL ASSISTANCE

(U.S. *Digest*, Ch. 6, §6)

### *United States-Switzerland*

On February 20, 1985, a representative of the Swiss Federal Office for Police Matters informed the United States Securities and Exchange Commission (SEC) of its Government's determination that no Swiss interests would be harmed by releasing documents requested by the United States under the United States-Swiss Treaty on Mutual Assistance in Criminal Matters (1977 Treaty).<sup>1</sup> The United States had made requests in connection with the Commission's complaint in *Securities and Exchange Commission v. Certain Unknown Purchasers*.<sup>2</sup>

Following public announcement on October 5, 1981 of the merger agreement between Santa Fe International Corporation and Kuwait Petroleum Corporation (KPC), a Kuwaiti Government-owned corporation, the Commission determined that Swiss banks had purchased on behalf of undisclosed customers over 3,000 Santa Fe call option contracts between September 21 and October 1, 1981, as well as 27,000 shares of Santa Fe common stock just prior to the announcement.

The Commission's complaint, as amended, alleged that the defendants—certain unknown purchasers and a named Kuwaiti businessman—and the nominal defendants—several banks, financial institutions and broker-dealers, some American, some Swiss and some Swiss-owned subsidiaries—had violated the antifraud provision of the Securities Exchange Act of 1934, section 10(b) (15 U.S.C. §78j(b)) and Rule 10b-5 thereunder (17 C.F.R. §240.10b-5). After the announcement, the market value of the call options increased by approximately \$5 million, a thirteenfold increase over their acquisition cost, and the common stock doubled in value. The Commission requested, and obtained, an order freezing the defendants' profits from the transactions, a temporary restraining order against their removal from the United States and an order for substituted service. The

\* Office of the Legal Adviser, Department of State.

<sup>1</sup> May 25, 1973, 27 UST 2019, TIAS No. 8302 (entered into force Jan. 23, 1977).

See Wash. Post, Feb. 21, 1985, at E4, col. 6.

<sup>2</sup> No. 81 Civ. 6553 (WCC) (S.D.N.Y. filed Oct. 26, 1981).

Commission also requested an accounting, disgorgement of profits and a permanent injunction prohibiting the unknown purchasers and the named Kuwaiti businessman from engaging in similar transactions in the future. Subsequently, on November 13, 1981, the Commission obtained a preliminary injunction prohibiting removal of the profits from the United States pending a hearing on the merits of the case.

Following discussions in Switzerland between the Director of the Commission's Division of Enforcement and Swiss officials, the Department of Justice, as the Central Authority of the United States under the 1977 Treaty, presented to the Swiss Federal Ministry of Justice and Police, as the Central Authority of Switzerland under the Treaty, a formal request, dated March 22, 1982, for assistance in obtaining relevant information from the nominal defendant banks about the identities of the unknown purchasers and their transactions. The request was predicated, in part, upon a written opinion by the Ministry's Chief of Division of International Legal Assistance (P. Schmid) that (1) the acts committed by the unknown purchasers qualified as "fraud under Article 146 of the Swiss Penal Code and as a violation of manufacture and business secrecy under Article 162 . . . [thereof]"; (2) the facts "clearly" warranted "reasonable suspicion that the offenders . . . may have violated U.S. penal law"; and (3) under the circumstances, the *Santa Fe* case had a penal aspect, which brought the investigation "by administrative authorities" (i.e., the SEC) within the coverage of the Treaty.

Although the Swiss Central Authority initially approved the request, the unknown purchaser defendants appealed the matter to the Swiss Federal Tribunal, which denied the Commission's request on January 26, 1983, ruling that assistance would be granted only if the Commission could state that the defendants were "tippees," i.e., those who had wrongfully received nonpublic information and were not insiders of the corporations involved.

On July 27, 1983, the Commission, through the Department of Justice, refiled its request to the Swiss Government for assistance, submitting additional evidence to comply with the Swiss Federal Tribunal's ruling on the first request. The second request read in part:

The U.S. Department of Justice and the Commission have analyzed the opinion of the Swiss Federal Tribunal. They believe that under the terms of the Federal Tribunal opinion and the facts presented herein assistance can be granted. Based upon the statements of the banks through which the suspect purchasing was conducted, the statements of the unknown purchasers to the Federal Tribunal and the facts and circumstances developed by the Commission, the U.S. Department of Justice and the Commission believe that the available evidence reflects conduct that would constitute a violation of both Swiss and U.S. law.

During the fifteen months since the U.S. Department of Justice formally requested assistance under the 1977 Treaty, the Commission staff has pursued numerous avenues to obtain evidence which would assist in the identification of the unknown purchasers. The available

evidence demonstrates that the unknown purchasers were neither employees nor agents of Santa Fe or KPC nor their necessary confidants, such as legal personnel, bankers, accountants and tax representatives who were involved in negotiations or who were responsible for special mandates with a view to the merger, or any other mandated person who was to keep the negotiations between Santa Fe and KPC secret. Accordingly, the Commission has concluded that the transactions in question were carried out by the unknown purchasers after the secret plan for the merger was revealed to them by an "insider", someone who was obligated not to make that revelation. In view of the written opinion of the Swiss Federal Tribunal, it appears that the unknown purchasers committed acts which, if committed in Switzerland, would have violated Article 162, ¶2 of the Swiss Criminal Code.

The Commission also has reason to believe that some of the unknown purchasers who are the subjects of this request were not insiders but instead acted in concert with other known persons and with each other in purchasing their common stock of and options for the common stock of Santa Fe after the revelation to one or more of them of material non-public information concerning the merger.

. . . . .

In its March 22, 1982 request for assistance the Commission established that the facts and circumstances of this case indicate that U.S. law was violated when the unknown purchasers relied upon non-public information when they purchased their common stock and options for the common stock of Santa Fe. This request details the basis for the Commission's belief that the unknown purchasers engaged in conduct which, if committed in Switzerland, would constitute a violation of Swiss law because they wrongfully utilized the non-public information about the merger negotiations. As a result the dual criminality requirements of the 1977 Treaty on Mutual Assistance have been met.

The evidence requested, including the identities of the unknown purchasers, is necessary to prove the following violations under Swiss law:

- a) [Name] disclosed secrets of Santa Fe to the unknown purchasers, Article 162 ¶1;
- b) [Name] and his associates profited from the unauthorized disclosure of Santa Fe's secrets, Article 162 ¶2;
- c) The unknown purchasers profited from the unauthorized disclosure of Santa Fe's secrets, Article 162 ¶2;
- d) [Name] profited from the unauthorized disclosure of Santa Fe's secrets, Article 162 ¶2.

The evidence requested, including knowledge of the identities of the unknown purchasers, is also essential for the Commission to be able to join them as defendants in the U.S. litigation and in order to prove the violations of the U.S. securities laws alleged herein against the defendants presently named in the Commission's litigation in New York.

The Commission renews the requests for documents and testimony made in its initial request for assistance. In addition, in light of the fact that it appears that those individuals may have acted in concert, the Commission requests that the subject banks produce: all account opening information; as well as account statements, confirmations of transactions, debit or credit memoranda, order tickets and correspondence for accounts held by the unknown purchasers or for their benefit for the period January 1, 1981 to December 31, 1981. This information is necessary to determine whether: a) the transactions in question were unusual or whether they were made in the normal course of business and b) whether the unknown purchasers acted for their own benefit and with their own money or whether they purchased in concert as part of an agreed upon scheme or on behalf of others.<sup>3</sup>

On May 16, 1984, the Swiss Federal Tribunal, "in a landmark decision," granted the second U.S. request and thus rejected the objections of the unknown purchasers. On May 17, 1984, the Swiss Federal Ministry of Justice and Police formally disclosed their identities to the U.S. Department of Justice. The defendants, however, appealed execution of the Tribunal's decision to an advisory commission, in accordance with Swiss legislation implementing the mutual assistance Treaty, for a determination whether essential Swiss interests would be jeopardized in executing the U.S. requests. In a letter dated June 14, 1984, the Ambassador of Switzerland to the United States, Klaus Jacobi, informed Judge William C. Conner of the Southern District of New York of these developments, saying: "The competent authorities of my Government reject this claim and have asked the president of this Commission not to consider these objections since their arguments are manifestly unfounded."<sup>4</sup>

The decision of the Swiss Federal Council, the final determining body, on February 20, 1985 provided the Securities and Exchange Commission with the remaining information and documents located in Switzerland that it had requested.

In the meantime, the SEC had applied for a default judgment against six of the erstwhile unknown purchasers who had neither appeared nor answered the Commission's complaint. The Commission also applied for entry of orders of permanent injunction and disgorgement.<sup>5</sup>

In consequence of the SEC's efforts to obtain information about the Santa Fe takeover tip-off and resulting Swiss-American consultations about the U.S. request for assistance under the 1977 Treaty, the two Governments

<sup>3</sup> Copies of the two U.S. requests for assistance are on file in the proceedings in the *Santa Fe* case, *id.*, and in Dept. of State File No. P85 0062-2192.

<sup>4</sup> The letter may also be found at Dept. of State File No. P85 0062-2152.

<sup>5</sup> In a Memorandum of Points and Authorities in Support of Plaintiff's Application for a Default Judgment, dated July 17, 1984, counsel for the Commission summarized the means by which verification of service upon the unknown defendants had been accomplished, as well as the Commission's actions to have the defendants appear in the action. See No. 81 Civ. 6553 (WCC) (S.D.N.Y. filed July 17, 1984); Dept. of State File No. P85 0062-2154.

concluded that the conduct of persons who used Swiss banks for effecting securities transactions in the United States to take advantage of material nonpublic information was detrimental to the interests of both countries. They agreed upon several means for improving international law enforcement cooperation in the field of insider trading, set out in a Memorandum of Understanding signed at Washington, D.C. on August 31, 1982 by the Chairman of the Securities and Exchange Commission, John S. R. Shad, and the Chief of the Financial and Economic Section of the Swiss Ministry of Foreign Affairs, Minister Jean Zwahlen.

Section II of the Memorandum of Understanding includes an exchange of opinions, pursuant to Article 39, paragraph 1 of the 1977 Treaty. The substance of the first is that an SEC investigation is to be considered an investigation for which assistance could be furnished (other Treaty requirements being met), if the investigation relates to conduct that might be dealt with by criminal courts. The substance of the second is that transactions effected by persons in possession of material nonpublic information could be offenses under Articles 148 (fraud), 159 (unfaithful management) or 162 (violation of business secrets) of the Swiss Penal Code (and thus meet the Treaty's dual criminality requirement), with the result that compulsory measures could often be ordered under the Treaty to help the SEC obtain information from banks executing such securities transactions in the United States.

The parties also agreed to exchange notes to facilitate the application of the Treaty to ancillary administrative proceedings that provide for sanctions and remedies other than the prison sentences and fines imposed in criminal prosecutions, in cases of Treaty-covered offenses relating to trading by persons in possession of material nonpublic information.

The third section of the Memorandum of Understanding discusses the use, pending enactment of Swiss federal legislation to prohibit misuse of inside information, of an alternative mechanism for handling U.S. requests for assistance for which compulsory measures under the 1977 Treaty would not be available because the insider trading transactions under investigation had not violated Swiss law. A proposed private Agreement between the Swiss Bankers' Association and signatory Swiss banks (those that might trade in the U.S. securities markets) would permit the banks to disclose a customer's identity and certain other relevant information, under certain specified circumstances, in response to a request made by the Department of Justice on behalf of the Securities and Exchange Commission and processed through the Swiss Federal Office for Police Matters. The Agreement would also govern the relationship between the signatory banks and clients placing orders with them for execution in U.S. securities markets, and contains safeguards intended to protect bank customers as well as Swiss sovereignty. Information obtained through the mechanism established by the Memorandum of Understanding and the private Agreement can be used or introduced as evidence only in administrative or judicial proceedings brought by the SEC or the Department of Justice regarding trading by persons in possession of material nonpublic



information, and cannot be used or introduced as evidence in any other proceeding.

The Agreement provides for appointment of a three-member Commission of Inquiry by the Board of Directors of the Swiss Bankers' Association to handle requests for assistance from the Securities and Exchange Commission not satisfying the dual criminality rule under the 1977 Treaty. The Agreement establishes criteria for volume and price changes within a 25-day period preceding public announcement of a "business combination" or an "acquisition" (of at least 10 percent of a company's shares), which, if met, shall satisfy the Commission of Inquiry as to the reasonableness of the SEC inquiry. In all other cases, the Commission shall review the information submitted by the SEC to decide whether an inquiry is warranted.

If the documentary requirements and evidentiary threshold for making the investigation are satisfied, the Commission of Inquiry shall call for a report on the transactions from the banks concerned, which are required immediately to block the account of a customer under investigation (to the extent of the profit realized or the loss avoided), to inform the customer and to invite the customer to furnish evidence and information to prove that the transaction did not violate U.S. insider trading laws. The bank shall then file a report with the Commission of Inquiry, which in turn shall furnish a report to the Federal Office for Police Matters for forwarding to the Securities and Exchange Commission, unless the customer establishes that he is not the entity or individual involved in a purchase or sale under investigation, or that he is not an insider under certain specified definitions.

Amounts blocked shall be held by a bank pending disposition of the matter by the SEC or U.S. courts. The bank undertakes to place such amounts in an interest-bearing account at the Commission's disposal. On request, the Commission will remit the amounts plus accrued interest to the SEC, if the amount demanded is not higher than the unlawful profit and either the United States court proceedings have terminated in a final judgment, by consent or otherwise, adverse to the customer, or the customer consents in writing. Provision is also made for unblocking.

If there is doubt as to the material accuracy of a bank's report, the Commission of Inquiry or the SEC can ask the Swiss Federal Banking Commission to examine whether the report conforms to the facts and to the Agreement.

Under the Memorandum of Understanding, the parties acknowledge that in some instances the Federal Office for Police Matters may determine that a bank's report under the private Agreement cannot be transmitted to the SEC without considerable harm either to essential Swiss interests or to third persons appearing to have no relationship to the offense under investigation. In such cases, the Federal Office for Police Matters will use its best efforts to adapt the report so that useful information may be provided to the Securities and Exchange Commission without causing harm to the interests of third persons or of Switzerland.

The Memorandum of Understanding also provides that its provisions do not modify or supersede any laws or regulations in force in either the United States or Switzerland and that there is no intent to confer a right to judicial review in U.S. courts upon any customer of a signatory bank with respect to any decision to disclose information to U.S. authorities under the terms of the private Agreement.<sup>6</sup>

#### INTERNATIONAL TRADE

(U.S. *Digest*, Ch. 10, §2)

##### *United States-Israel Free Trade Area Agreement*

On April 22, 1985, Ambassador William E. Brock, the United States Trade Representative, and Israeli Minister of Trade and Finance Ariel Sharon signed an Agreement establishing a bilateral free trade area, which provides for the reduction or elimination of tariffs and nontariff barriers on all commercial trade between them on the basis of reciprocity, in four phases to be completed by January 1, 1995.

A Circular 175 recommendation that the Department of State concur in the conclusion of the Agreement, set out in a memorandum from Acting Assistant Secretary of State Elinor G. Constable to the Under Secretary of State for Economic Affairs, Allen Wallis, dated April 18, 1985, stated in part:

An FTA consists of two or more countries that have eliminated duties and non-tariff barriers on substantially all trade between them. Existing free trade areas differ in terms of coverage, number of participants and staging (or the rate at which tariffs are reduced). The GATT expressly sanctions FTA's or customs unions as a permitted deviation from the most-favored-nation ("MFN") obligations contained in Article I, provided that the FTA meets certain criteria specifically set out in Article XXIV. In particular, GATT-consistent FTA's must be designed "to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories," must cover "substantially all the trade" between the parties, and must be staged into effect within a "reasonable" length of time.<sup>1</sup>

A summary of the Agreement, prepared by the Office of the Trade Representative, follows in part:

#### I. BACKGROUND

In November 1983 [November 29, 1983], President Reagan and former Israeli Prime Minister Shamir agreed to begin discussions

<sup>6</sup> For the Memorandum of Understanding and the proposed private Agreement, see 22 ILM 1 and 7 (1983). As of Jan. 1, 1983, the majority of Swiss banks had agreed to the provisions of Agreement XVI of the Swiss Bankers' Association with regard to the Handling of Requests for Information from the Securities and Exchange Commission of the United States on the Subject of Misuse of Inside Information.

<sup>1</sup> Dept. of State Staff Secretariat Doc. No. 8511703, Dept. of State File No. P85 0060-0601.

towards the establishment of a bilateral Free Trade Area ("FTA"). These discussions began in January 1983. The Trade and Tariff Act of 1984 provided the President with the authority to conclude a trade agreement with Israel providing for the reduction or elimination of tariffs and nontariff barriers, and to submit such an agreement and its implementing legislation for "fast-track" Congressional review following the procedures of sections 102 and 151 of the Trade Act of 1974. Negotiations with Israel were concluded on February 26, 1985. At this time, in accordance with the requirements of the Trade Act of 1974 and the Trade and Tariff Act of 1984, the Administration is entering into consultations with the Congress prior to the formal signing of the Agreement and the submission of implementing legislation.

. . . . .

## II. AN OVERVIEW OF THE AGREEMENT

The Agreement comprises a Preamble and twenty-three separate Articles, as well as four Annexes, which are integral parts of the Agreement. . . . Annexes 1 and 2 provide the schedule of tariff reductions for both nations. Many of the Articles and one of the Annexes (Annex 3 on Rules of Origin) address nontariff barriers to trade. Annex 4 is Israel's commitment on the reduction and elimination of export subsidies.

In the drafting of this Agreement it was recognized that the U.S.-Israel FTA should be viewed as an adjunct to the existing multilateral obligations of both the U.S. and Israel under the GATT. The creation of a FTA between two GATT signatories is authorized by the GATT in its Article XXIV. The increased trade liberalization which will occur on a bilateral basis as a result of the FTA will be undertaken in the context of the world multilateral trading system.

In the establishment of the FTA, both nations wished to maintain their commitment to the GATT. From a legal drafting standpoint, it was concluded that the Agreement should rely on the framework and rights and obligations of the GATT. Therefore, the Agreement and the GATT are intended to be read together: Unless specifically modified by the terms of this Agreement, the provisions of the GATT will continue to apply to the relations of the United States and Israel.

In other words, a procedure authorized by the GATT may be modified by a provision of the Agreement. However, if the Agreement does not address an issue, the relevant GATT provision would apply. Thus, as this Agreement, in accordance with section 406 of the Trade and Tariff Act of 1984, does not alter the existing administration of antidumping and countervailing duty procedures, there is no provision for it in the Agreement. The GATT procedures, set out in GATT Article VI and the relevant Codes, continue in force.

In certain areas, however, the Agreement modifies existing provisions in the GATT which would otherwise apply. These are:

—*Safeguards*: Article 5 addresses the application of the safeguard provision of GATT Article XIX to bring the bilateral arrangement

between the U.S. and Israel in conformity with the Congressional directive contained in Section 406 of the Trade and Tariff Act of 1984.

—*Infant Industries*: Article 10 puts restrictions on Israel's right to apply protective measures to benefit infant industries during the Agreement's phase-out period, which it would otherwise have under GATT Article XVIII, Section C.

—*Balance of Payments*: Article 11 restricts the application of the more liberal GATT balance of payments provisions contained in Articles XII and XVIII, Section B, by putting strict limitations on the use of quantitative restrictions and other temporary trade measures.

—*Specific Duties*: Article 21 modifies the right of both parties to increase their specific duties to keep pace with changes in the value of their currency in order to provide a more precise and modern standard than provided in GATT Article II, 6.

—*Tariff Concessions*: In Annexes 1 and 2, which provide for the reduction and elimination of tariffs between the U.S. and Israel, a tariff regime is established which is different from that contained in the U.S. concessions under GATT Article II.

In three areas the Agreement addresses trade issues that are the subject of GATT Codes. These are:

—*Subsidies*: Annex 4 contains, in the form of a letter to Ambassador Brock from Minister Sharon, the Government of Israel's commitment on export subsidies. The letter, like the other Annexes, is an integral part of the Agreement. In the letter, the Government of Israel undertakes that by the end of six years Israel will eliminate its export subsidies programs on industrial goods and processed agricultural products. The Government of Israel also commits itself to sign the Subsidies Code.

—*Licensing*: Article 12 provides for licensing procedures which are more restrictive than those contained in the GATT Code on Import Licensing Procedures.

—*Government Procurement*: Both Israel and the United States are parties to the international Government Procurement Code which provides for the waiver of "buy national" restrictions on a reciprocal basis for a broad range of purchases. Under Article 15 of the FTA, the United States and Israel agree to a further elimination of government procurement related trade restrictions by lowering, on a bilateral basis, the threshold for application of the Code from 150,000 SDRs (about \$156,000) to \$50,000. Also, Israel agrees to eliminate buy national restrictions in regard to purchases of non-military products by its Ministry of Defense and to relax offset requirements in regard to civilian agency procurement.

In addition to these provisions which modify in some manner existing GATT rights, the Agreement also provides for certain new bilateral rights and obligations. Notable among these:

—*No New Trade Restrictions*: Article 4 provides that no new trade restrictions may be applied bilaterally except as permitted by the terms of the Agreement or by the GATT.

—*Restrictions for Agricultural Policy*: Article 6 provides that both nations may maintain import restrictions based on agricultural policy considerations.

—*Kosher Laws*: Article 8 provides Israel with a right to impose, on the principles of national treatment, import restrictions for the purpose of its Kosher laws.

—*Export Requirements*: Article 13 provides new discipline on the use of export requirements as a condition of establishment and local purchase requirements as a condition for receiving governmental incentives.

Also, the Agreement includes general provisions which create consultation mechanisms, sets out rules of origin, encourages cooperation and reaffirms bilateral and multilateral trade commitments. Among these:

—*Consultation and Dispute Settlement*: A Joint Committee is established for the discussion of bilateral trade issues in Article 17. Articles 18 and 19 provide for notice and consultation procedures and establish a mechanism for the resolution of bilateral disputes.

—*Rules of Origin*: Annex 3 of the Agreement provides for the applicable rules of origin. These have been drafted to be consistent with the directions provided by Congress which are set out in Title IV of the Trade and Tariff Act of 1984. These rules are based upon those in force for the Caribbean Basin Initiative with minor modifications.

—*Exceptions*: The General Exceptions provision of GATT Article XX and the Security Exception provision of Article XXI are incorporated into the Agreement.

—*Trade in Services*: Article 16 states that both nations recognize the importance of trade in services and agree to develop means of cooperation pursuant to a separate Declaration on Services, which has been agreed to.

### III. TARIFF PACKAGE

#### A. *Trade Covered by the Agreement*

All commercial trade between the United States and Israel will be covered by the Agreement. In 1982, the year used as a base for our negotiations, the United States exported \$1.5 billion in products to Israel and imported \$1.2 billion in goods from Israel. Many products traded between the United States and Israel already receive duty free treatment as a result of concessions they have given to all GATT members (MFN duty free trade). In 1982, 55 percent (or \$647 million) of the products we *imported* from Israel were duty free on an MFN basis, while only 28 percent (\$269 million) of the products we *exported* to Israel benefit from legally bound duty free treatment.

The negotiations thus centered on the remaining portion of the trade which is legally dutiable. For the United States, this includes those items which are eligible for the U.S. Generalized System of Preferences (GSP) and which receive duty free treatment under this program on a temporary basis. For Israel, all products now entering Israel on a temporary, unbound duty free basis were included. Thus, for the United States, the value of trade to be liberalized under the agreement (based upon 1982 trade) is \$515 million. For Israel, the trade to be liberalized is valued at \$1,278 million.

*B. General Description of Staging*

The United States and Israel agreed from the outset of negotiations that the free trade area to be established between them would meet fully the requirements of GATT Article XXIV. To meet this test, both parties have agreed to include all products in the agreement and to phase out all duties within ten years (by January 1, 1995). This will be accomplished in four stages:

- 1) Elimination of some duties immediately upon entry into force of the agreement;
- 2) Elimination of duties on some products in three different tariff cuts by January 1, 1989;
- 3) Elimination of duties in eight different cuts over ten years (by January 1, 1995);
- 4) No duty reduction for five years, with reexamination of the timetable for duty elimination following receipt of additional advice from the United States International Trade Commission (USITC).

. . . . .

*D. Israeli Treatment of Particular Products*

One of our key negotiating objectives was to assure that U.S. products no longer faced any tariff disadvantage vis-a-vis our major competitor in the Israeli market, the European Community. Since the European Community and Israel have a bilateral preferential agreement which provides for duty free treatment in the industrial sector by January 1, 1989, our goal was to have as many industrial products in the second stage as possible, and to assure that immediately upon entry into force of our agreement, we received a duty rate equal to that of the European Community on key products.<sup>2</sup>

<sup>2</sup> 131 CONG. REC. S2463, S2464-66 (daily ed. Mar. 5, 1985); Dept. of State File No. P85 0060-0576.

Most products in U.S.-Israeli trade will fall into the first phase of tariff reductions calling for elimination of duties immediately upon entry into force of the Agreement. (At the present time, 90 percent of all Israeli products already enter the United States duty free.) On the U.S. side, a key negotiating objective was to obtain a duty rate equal to that accorded by Israel earlier to the European Community.

Statutory directives for the Agreement were set out in Title IV of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, approved Oct. 30, 1984, 98 Stat. 2948, 3013. Signature of the Agreement, which was initialed on Mar. 7, 1985, was delayed pending completion of the congressional consultative process required by sec. 102(b)(1) of the Trade Act of 1974, as amended by the Trade and Tariff Act of 1984, including agreement upon implementing legislation (enacted as Pub. L. No. 99-47, June 11, 1985).

## JUDICIAL DECISIONS

MONROE LEIGH

*Act of state doctrine—promissory notes—situs of contractual debt—comity*

ALLIED BANK INTERNATIONAL v. BANCO CREDITO AGRICOLA DE CARTAGO. 757 F.2d 516.

U.S. Court of Appeals, 2d Cir., March 18, 1985.

Appellant, Allied Bank International, brought an action on behalf of a syndicate of 39 banks to recover unpaid principal and accrued interest on a series of promissory notes issued by appellees, three Costa Rican banks wholly owned by the Government of Costa Rica. Appellees had ceased making payments on the notes in reliance on decrees issued by the Costa Rican Government prohibiting the repayment of foreign currency obligations in order to resolve a national economic crisis. The district court dismissed the action on the basis of the act of state doctrine.<sup>1</sup> The U.S. Court of Appeals for the Second Circuit affirmed per curiam, holding that regardless of the application of the act of state doctrine, the actions of the Costa Rican Government were consistent with U.S. law and policy and were therefore entitled to recognition on the basis of comity.<sup>2</sup> Appellants moved for a rehearing, and the U.S. Government filed a brief amicus curiae disputing the court's conclusion that the Costa Rican Government's actions were consistent with U.S. law and policy. Upon rehearing, the court (per Meskill, J.) vacated its previous decision, reversed the lower court's denial of plaintiff's motion for summary judgment, directed the lower court to enter judgment for plaintiff, and *held*: (1) that the Costa Rican directives were in fact inconsistent with U.S. law and policy and therefore did not excuse the obligations of the Costa Rican banks; and (2) that the act of state doctrine did not bar judicial review of this dispute.

In light of the amicus curiae brief of the U.S. Government, the court first reconsidered its earlier decision holding that the actions of the Costa Rican Government were consistent with U.S. law and policy. The amicus brief explained that while the U.S. Government supports debt resolution procedures under the auspices of the International Monetary Fund, these procedures are grounded "in the understanding that, while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid and enforceable."<sup>3</sup> Therefore, Costa Rica's attempted unilateral restructuring of private obligations was inconsistent with U.S. policy. The amicus brief also explained that the U.S. Govern-

<sup>1</sup> 566 F.Supp. 1440 (S.D.N.Y. 1983), summarized in 78 AJIL 441 (1984). Following the district court's dismissal, 38 of the 39 plaintiff banks signed a refinancing agreement. Thus, only one of the original plaintiffs was represented on appeal.

<sup>2</sup> No. 83-7714 (2d Cir. Apr. 23, 1984), summarized in 78 AJIL 899 (1984).

<sup>3</sup> 757 F.2d 516, 519.

ment's position on private international debt was not inconsistent with either its willingness to restructure Costa Rica's intergovernmental obligations or with continued U.S. aid to Costa Rica. In light of this elucidation, the court concluded that its previous interpretation of U.S. policy was incorrect.

Having determined that U.S. policy was in fact inconsistent with the Costa Rican directives, the court squarely faced the act of state issue. The court observed that the act of state doctrine does not bar inquiry by the courts into the validity of extraterritorial takings and that the applicability of the doctrine is therefore dependent upon "the situs of the property at the time of the purported taking."<sup>4</sup> The court noted that "the concept of the situs of a debt for act of state purposes differs from the ordinary concept. It depends in large part on whether the purported taking can be said to have 'come to complete fruition within the dominion of the [foreign] government.'"<sup>5</sup> The court concluded that in this case the situs of the debt was not Costa Rica because the Costa Rican Government could not wholly extinguish the Costa Rican banks' obligation to pay U.S. dollars in a timely manner to appellants in New York.

The court also determined that the same result obtained under "ordinary situs analysis." In this respect, the court observed that the Costa Rican banks had conceded jurisdiction in New York and had agreed to pay the debt in New York City in U.S. dollars. Moreover, Allied Bank, the designated syndicate agent, was located in New York, and some of the negotiations between the parties had taken place in the United States. Finally, the court observed that

[t]he United States has an interest in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of contract law.<sup>6</sup>

The court acknowledged that Costa Rica had a legitimate interest in overseeing the obligations of state-owned banks and maintaining a stable economy. However, its interest in the contracts at issue was limited to the extent to which it could "unilaterally alter the payment terms." Thus, the court concluded, "Costa Rica's potential jurisdiction over the debt is not sufficient to locate the debt there for the purposes of act of state doctrine analysis."<sup>7</sup>

Finally, the court noted that acts of foreign governments purporting to have an extraterritorial effect should be recognized by U.S. courts only if they are consistent with the law and policy of the United States. Since, as

<sup>4</sup> *Id.* at 521.

<sup>5</sup> *Id.* (quoting *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715-16 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968)).

<sup>6</sup> 757 F.2d at 521-22.

<sup>7</sup> *Id.* at 522.



the court had previously concluded, the Costa Rican Government's unilateral attempt to repudiate private commercial obligations was inconsistent with U.S. law and policy, the court refused to recognize the extraterritorial effect of the Costa Rican Government's decrees.<sup>8</sup>

*Extraterritorial jurisdiction—antitrust violations—application of jurisdictional “rule of reason”*

TIMBERLANE LUMBER CO. v. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION. 749 F.2d 1378.  
U.S. Court of Appeals, 9th Cir., December 27, 1984.

In a long-standing antitrust action, plaintiff, Timberlane Lumber Company (Timberlane), alleged that defendant, Bank of America, conspired with several Honduran companies to prevent Timberlane from milling lumber in Honduras and exporting it to the United States.<sup>1</sup> The district court dismissed the case for lack of subject matter jurisdiction.<sup>2</sup> The U.S. Court of Appeals for the Ninth Circuit (per Sneed, J.) affirmed and *held*: that based on the jurisdictional “rule of reason” analysis, it was proper to dismiss the case for lack of subject matter jurisdiction without affording plaintiff summary judgment treatment.

As a preliminary matter, plaintiff challenged the lower court's use of Federal Rule of Civil Procedure 12(b)(1) to dismiss the case, arguing that the question of jurisdiction was so closely related to the merits of the case that the lower court should have considered defendant's motion to dismiss under the summary judgment standard set forth in Rule 56. In rejecting this argument, the court observed that the district court had refused to exercise jurisdiction because of notions of international comity and fairness. According to the court, decisions based on this rationale “need not directly implicate the merits of the case [and] can involve a policy judgment that requires a consideration only of the facts as alleged.”<sup>3</sup> Recognizing that not all cases involving a question of extraterritorial jurisdiction should be decided under Rule 12(b)(1), the court nevertheless found that a decision based on international comity and fairness “should ordinarily be viewed as not involving the merits of the antitrust dispute.”<sup>4</sup>

Turning to the issue of subject matter jurisdiction, the court agreed

<sup>8</sup> On Apr. 1, 1985, appellees filed a petition for a rehearing or, in the alternative, a rehearing en banc, in which counsel questioned the court's reliance on the U.S. amicus brief and the conclusion that the situs of the debt was in the United States.

<sup>1</sup> In an earlier decision in this case, the Court of Appeals for the Ninth Circuit established a jurisdictional “rule of reason” for determining the extent of federal jurisdiction in cases alleging illegal antitrust behavior abroad. The court vacated the lower court's dismissal and remanded the case for additional discovery in light of the new jurisdictional “rule of reason.” See *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Savings Ass'n*, 549 F.2d 597 (9th Cir. 1976) [hereinafter referred to as *Timberlane I*].

<sup>2</sup> *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Savings Ass'n*, 574 F.Supp. 1453 (N.D. Cal. 1983).

<sup>3</sup> 749 F.2d 1378, 1382.

<sup>4</sup> *Id.* at 1381 n.1.

with the district court's decision to dismiss but espoused a different rationale under the three-part jurisdictional "rule of reason" established in *Timberlane I*.<sup>5</sup> First, the court emphasized "that there [must] be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under [the antitrust] statutes."<sup>6</sup> The court noted that even Bank of America had conceded that this burden had been met.

A second consideration "is whether the magnitude of the effect identified in the first part of the test rises to the level of a civil antitrust violation, i.e., conduct that has a direct and substantial anticompetitive effect."<sup>7</sup> In this case, since *Timberlane* had alleged a conspiracy to prevent it from milling lumber in Honduras and exporting it to the United States, *Timberlane* had satisfied this element of the analysis. In so finding, the court specifically rejected the suggestion that it is necessary to show "a 'direct and substantial' effect on the foreign commerce of the United States."<sup>8</sup>

As for the final question, whether as a matter of international comity and fairness the extraterritorial jurisdiction of the United States should be asserted, the court reaffirmed the seven-part balancing test it had established in *Timberlane I*.<sup>9</sup> The first of the seven factors requires judicial consideration of the degree of actual or potential conflict with foreign law or policy that may arise from the enforcement of U.S. antitrust laws. The court examined Honduran law and observed:

The [Honduran Commercial] Code specifically condemns any laws prohibiting agreements (even among competitors) to restrict or divide commercial activity. Under Honduran law, competitors may agree to allocate geographic or market territories, to restrict price or output, to cut off the source of raw materials . . . . It appears that Honduran law intimately regulates private commercial activity in that country. Honduran law also promotes agreements that improve the competitive position of domestic industries in world markets by promoting efficiency and economies of scale.<sup>10</sup>

The court concluded that the potential conflict with the Honduran Government's effort to foster a particular type of business climate was itself a sufficient reason to decline to exercise jurisdiction "unless outweighed by other factors in the comity analysis."<sup>11</sup> Since the other factors

<sup>5</sup> See note 1 *supra*.

<sup>6</sup> 749 F.2d at 1383 (quoting *Timberlane I*, 549 F.2d at 613) (emphasis in original).

<sup>7</sup> 749 F.2d at 1383.

<sup>8</sup> *Id.*

<sup>9</sup> These factors are (1) the degree of conflict with foreign law or policy; (2) the nationality or allegiance of the parties and the locations of principal places of business of corporations; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of effects on the United States as compared with those elsewhere; (5) the extent to which there is explicit purpose to harm or affect American commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

<sup>10</sup> 749 F.2d at 1384.

<sup>11</sup> *Id.*

did not outweigh this first consideration, the court concluded that federal jurisdiction should not be exercised in this case.

The decision in *Timberlane* reaffirms the Ninth Circuit's adoption of a comparative interest-balancing test to determine whether to exercise extraterritorial jurisdiction. This approach stands in stark contrast with the position of the U.S. Court of Appeals for the District of Columbia, which recently rejected judicial efforts to balance foreign interests against U.S. interests to determine whether U.S. jurisdiction should be asserted over international antitrust disputes.<sup>12</sup>

One may speculate about the impact of *Timberlane* on international antitrust litigation. By emphasizing that "direct and substantial" effects on U.S. foreign commerce are not required to establish jurisdiction, the court may have provided support for the latest version of the draft *Restatement of Foreign Relations Law (Revised)*, which permits the assertion of U.S. jurisdiction in international antitrust suits "if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has *some* effect on that commerce."<sup>13</sup> On the other hand, the court has redefined "cognizable injury" under the second criterion of its three-part test to mean a "direct and substantial anticompetitive effect," thereby responding to criticism that *Timberlane I* improperly permitted a finding of jurisdiction on the basis of only minor effects on U.S. commerce. More intriguing is whether the court's rationale for refusing to exercise jurisdiction may make it more difficult for antitrust plaintiffs to obtain relief against foreign companies operating in a permissive regulatory environment, even though such companies are aware of U.S. antitrust laws and actually intend to restrict competition in U.S. commerce.<sup>14</sup>

*Act of state doctrine—foreign compulsion defense—Railway Labor Act—collective bargaining agreement—unfair labor practice by a foreign corporation—superseding executive agreement*

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL v. TACA INTERNATIONAL AIRLINES, S.A. 748 F.2d 965.

U.S. Court of Appeals, 5th Cir., December 10, 1984.

Appellant, TACA International Airlines (TACA), sought review of a district court order enjoining it from unilaterally abrogating a collective bargaining agreement with its pilots and from transferring its pilot base

<sup>12</sup> See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-53 (D.C. Cir. 1984), summarized in 78 AJIL 666 (1984).

<sup>13</sup> RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §415(2) (Tent. Draft No. 6, 1985) (emphasis added). However, the revised *Restatement* would also establish that the assertion of U.S. jurisdiction in that circumstance would be "presumptively reasonable." *Id.* §415 comment a. Moreover, if a principal purpose of the conduct or agreement is not to interfere with U.S. commerce, jurisdiction may be asserted only if the "agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable." *Id.* §415(3).

<sup>14</sup> Cf. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (intention to affect plus effect on U.S. commerce constitutes sufficient basis for U.S. jurisdiction).

from New Orleans to El Salvador. The U.S. Court of Appeals for the Fifth Circuit (per Politz, J.) affirmed the district court's injunction and *held*: that the Railway Labor Act and other applicable laws prohibited the airline from relocating its pilot base, and that the act of state doctrine did not preclude judicial resolution of the dispute.

Appellant, a corporation owned and controlled by Salvadoran citizens, had begun airline service between El Salvador and the United States in 1949, at which time it established a pilot base in New Orleans. Beginning in 1968, TACA and the Airline Pilots Association (ALPA), which was the recognized bargaining agent for all TACA pilots, executed successive collective bargaining agreements under the Railway Labor Act (45 U.S.C. §§151 *et seq.* (1982)).<sup>1</sup> In 1969, TACA began efforts to move its pilot base from New Orleans pursuant to a request from the Government of El Salvador. However, this effort was halted when ALPA obtained a federal district court order enjoining TACA, since relocation would violate the then existing collective bargaining agreement between TACA and ALPA.<sup>2</sup> Following the 1969 injunction, several events took place that led to the present controversy. In April 1982, the United States and El Salvador executed a Civil Aviation Agreement designed to regulate and promote transportation between the two countries.<sup>3</sup> In October 1983, TACA and ALPA began collective bargaining negotiations to renew the existing labor agreement. However, on December 20, 1983, El Salvador adopted a new Constitution requiring all Salvadoran "public service companies" to maintain their "work center and base of operations in El Salvador."<sup>4</sup> The day after the new Constitution took effect, the Salvadoran Ministry of Labor ordered the airline to move its pilot base to El Salvador. TACA notified its pilots that it intended to relocate the pilot base to El Salvador, that ALPA would no longer be recognized as the pilots' bargaining agent, and that the pilots must sign individual contracts accepting the new terms of employment or be fired. ALPA filed suit, and the U.S. District Court for the Eastern District of Louisiana (1) held that TACA's actions violated the Railway Labor Act, and (2) permanently enjoined TACA from unilaterally moving its pilot base or otherwise changing the terms of the collective bargaining agreement.

On appeal, TACA argued that the Railway Labor Act had been superseded by the 1982 U.S.-El Salvador Civil Aviation Agreement, which allegedly permitted it to maintain or transfer its New Orleans pilot base at its discretion. TACA also contended that any violation of the Act was compelled by Salvadoran law and should therefore be excused. Finally, TACA invoked the act of state doctrine.

The appeals court's analysis focused mainly on the airline's act of state defense. The court articulated three factors to be weighed in deciding

<sup>1</sup> Despite its title, the Railway Labor Act also governs airline labor relations.

<sup>2</sup> See *Ruby v. TACA Int'l Airlines, S.A.*, 439 F.2d 1359, 1361 (5th Cir. 1971).

<sup>3</sup> Civil Aviation Agreement, Apr. 2, 1982, U.S.-El Salvador, TIAS No. 10488.

<sup>4</sup> EL SALVADOR CONST. art. 110, ¶4 (adopted Dec. 20, 1983).

whether it should apply the act of state doctrine: (1) "the degree of involvement of the foreign state"; (2) "the effect a judicial decision in a given case will have on our foreign relations"; and (3) "whether a decision in a given case will involve the adjudication of the laws, conduct or motivation of a foreign government."<sup>5</sup> While the court acknowledged the Salvadoran Government's interest in assuring that its corporations obey the Salvadoran Constitution and laws, it stressed that the Government was not a party to the dispute (although it had filed an amicus brief) and that TACA, a private entity, had voluntarily chosen to conduct business within the United States, thereby becoming subject to all relevant domestic laws. The court therefore declined to give El Salvador's interest controlling weight. As for the second factor, the court merely noted that the "present controversy does not involve sensitive areas of international relations that require our deference to the initiatives of the executive branch."<sup>6</sup>

Regarding the final factor, the court focused on the territorial limitations of the act of state doctrine as articulated in prior cases. Relying primarily on *Maltina Corp. v. Cawby Bottling Co.*<sup>7</sup> and *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*,<sup>8</sup> the court observed that the act of state doctrine does not apply where the *res* subject to the foreign government's act is located outside the territorial jurisdiction of the foreign government.<sup>9</sup> Despite possible differences between the *res* involved in this case and the property interests at issue in earlier act of state cases, the court stated that "the *res* or interest in this case, whether we deem it the pilot base or the collective bargaining agreement, is clearly located in the United States."<sup>10</sup> The court therefore found the act of state doctrine to be inapplicable.

Two other defenses raised by TACA were summarily rejected. The airline's argument that the Railway Labor Act was superseded by the subsequent United States-El Salvador Civil Aviation Agreement presented the potentially thorny question of whether an executive agreement, not ratified by Congress, can abrogate a federal statute. The court avoided the issue by finding that, in fact, there was no conflict between the Act and the Agreement. Similarly, the court discounted the airline's "foreign compulsion defense." Relying on the factors set forth in section 40 of the *Restatement (Second) of the Foreign Relations Law of the United States* for evaluating the strength of such a defense,<sup>11</sup> the court stressed the impor-

<sup>5</sup> 748 F.2d 965, 970.

<sup>6</sup> *Id.* at 971.

<sup>7</sup> 462 F.2d 1021 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972).

<sup>8</sup> 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).

<sup>9</sup> 748 F.2d at 970-71. See *Maltina*, 462 F.2d at 1027; *Tabacalera*, 392 F.2d at 715-16.

<sup>10</sup> 748 F.2d at 971.

<sup>11</sup> Those factors are:

- (a) vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and

tance of collective bargaining agreements as a "cornerstone" of American labor policy and rejected the defense for "reasons previously discussed."<sup>12</sup>

The act of state doctrine has undergone considerable judicial narrowing since its expansive formulation in the *Sabbatino* case.<sup>13</sup> In a context different from the expropriation cases, the *TACA* decision contributes to this trend by confirming the territorial limits of the doctrine in order to protect important principles of U.S. labor policy.

*Treaty interpretation—friendship, commerce and navigation treaties—relation of employment discrimination laws to treaty provision allowing national hiring preference*

WICKES v. OLYMPIC AIRWAYS. 745 F.2d 363.

U.S. Court of Appeals, 6th Cir., October 3, 1984.

Appellant, a United States citizen, sought review of a district court's ruling that his employment discrimination suit against an airline owned by the Greek Government was barred as a matter of law by the provisions of the 1951 Treaty of Friendship, Commerce and Navigation (FCN Treaty) between Greece and the United States.<sup>1</sup> The U.S. Court of Appeals for the Sixth Circuit (per Merritt, J.) reversed and *held*: that the FCN Treaty only afforded Greek corporations a narrow right to discriminate in favor of Greek nationals when hiring managerial personnel and did not constitute a broad exemption from state employment discrimination laws.

Appellant had been employed in the United States by Olympic Airways (Olympic) as a district sales manager from 1967 until he was terminated in 1980. Thereafter, he brought suit under state law alleging that Olympic discriminated against him on the basis of age and national origin. In response, Olympic claimed that the suit was barred by Article XII(4) of the FCN Treaty, which provides in part: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other employees of their choice among those legally in the country and eligible to work" (emphasis added). The district court found that the phrase "of their choice" created a broad exception to the employment discrimination laws of the United States.

On appeal, the court conducted a detailed examination of the FCN Treaty and similar treaties that the United States concluded with other nations following World War II. The court observed that these treaties accorded foreign nationals doing business in host countries two forms of rights, categorized as "contingent" standards and "noncontingent" stan-

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(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

*Id.* at 971-72.

<sup>12</sup> *Id.* at 972.

<sup>13</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>1</sup> Aug. 3 and Dec. 26, 1951, 5 UST 1829, TIAS No. 3057.

dards. As characterized by the court, contingent standards guarantee foreign nationals rights no less favorable than those of (1) aliens from other countries ("most-favored nation treatment") or (2) citizens of the host country ("national treatment"); and noncontingent standards protect vital rights and privileges of foreign nationals regardless of whether these same rights are accorded to the indigenous population by the foreign government.

The court found that Article XII of the FCN Treaty conferred a noncontingent right, establishing "an absolute rule permitting foreign nationals a certain guaranteed range of control of their overseas investments."<sup>2</sup> However, the court accepted the position of the U.S. Department of State, as *amicus curiae*, that Article XII creates "both a right to employ and a limitation on that right."<sup>3</sup> According to the court, "companies of either party are permitted to discriminate in favor of their own nationals or citizens for certain high level positions, but not to discriminate against others in the labor force of the host country on any other basis."<sup>4</sup> Thus, "Article XII was intended to be a narrow privilege to employ Greek citizens for certain high level positions, not a wholesale immunity from compliance with labor laws prohibiting other forms of employment discrimination."<sup>5</sup> The court supported this interpretation by noting that nothing in the *travaux préparatoires* of the FCN Treaty or the legislative history created at the time of its ratification indicated that the Treaty was intended to override state employment discrimination laws.

Responding to concerns that the Treaty would enable a Greek corporation to flout employment discrimination laws by designating anyone as a "manager," the court noted that U.S. immigration procedure provides a safeguard. Before a visa for personnel hired under the Treaty will be issued, the State Department must certify that the employee "will be 'engaged in duties of a supervisory or executive character, or if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise.'"<sup>6</sup> According to the court, this State Department review in the visa process reduces the likelihood of abusive use of the Treaty.

The decision in *Wickes* goes further than *Sumitomo Shoji America, Inc. v. Avagliano*,<sup>7</sup> wherein the Supreme Court addressed a similar issue involving a conflict between the U.S.-Japan FCN Treaty and federal employment discrimination laws. In *Sumitomo*, a unanimous Supreme Court found that a U.S. subsidiary of a Japanese parent corporation was not entitled to any right to discriminate under a similar FCN Treaty. The Court reasoned that although the U.S. subsidiary was wholly owned by a Japanese parent, it could not qualify for protection under the Treaty as a company of Japan

<sup>2</sup> 745 F.2d 363, 367.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 365 (emphasis in original).

<sup>6</sup> *Id.* at 369 (quoting 22 C.F.R. §41.40 (1984), 9 Foreign Affairs Manual, pt. II, §4.40 n.16 (1975)).

<sup>7</sup> 457 U.S. 176 (1982), summarized in 76 AJIL 853 (1982).

in light of the fact that it was incorporated in New York. Accordingly, the Court never reached the merits of the dispute.

It may also be noted that there is potential for subsequent confusion in implementing the Sixth Circuit's decision as parties battle over which particular jobs are at sufficiently high levels to permit discrimination. Unfortunately, the court did not set forth criteria that might be helpful in resolving this question.

*Foreign Sovereign Immunities Act—statute of limitations bars recovery on defaulted foreign government treasury notes*

SCHMIDT v. POLISH PEOPLE'S REPUBLIC. 742 F.2d 67.  
U.S. Court of Appeals, 2d Cir., August 16, 1984.

Appellants, U.S. citizens and successor trustees to a former corporate bondholder, challenged a district court's dismissal of their action to collect on certain defaulted treasury notes issued by appellee, the Polish Government, in 1929 and 1930 to help finance the construction of several thousand railway cars. Most of the railway cars, which were pledged as security for the treasury notes, were destroyed or lost during World War II. The district court dismissed the action as time barred under the New York 6-year statute of limitations. The U.S. Court of Appeals for the Second Circuit (per Winter, J.) affirmed and *held*: that the New York statute of limitations barred the appellants' recovery on the defaulted treasury notes.<sup>1</sup>

Appellants contended that their suit was timely, since, under New York law, the statute of limitations is tolled while the defendant is absent from the jurisdiction.<sup>2</sup> Appellants claimed that prior to January 19, 1977—the effective date of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602–1611 (1982)) (FSIA)—Poland could not be served with process and was therefore effectively absent from the jurisdiction. The court of appeals rejected this argument, reasoning that it interpreted the FSIA too broadly and could possibly result in reviving all claims against foreign governments that existed prior to the Act's passage. The court found no language or legislative history in the FSIA indicating that Congress intended "such [a] wholesale reactivation of ancient claims."<sup>3</sup> In any case, the court observed, Poland was not immune from service prior to the effective date of the FSIA. The court reasoned that ever since the U.S. Government issued the "Tate letter"<sup>4</sup> in 1952, foreign governments have not enjoyed sovereign immunity in U.S. courts with respect to their commercial activities. Thus, appellants could have attempted to serve

<sup>1</sup> Since the court dismissed the appellants' claim, it did not address the appellee's cross-appeal challenging the district court's finding of personal jurisdiction over the Polish Government.

<sup>2</sup> N.Y. CIV. PRAC. LAW §207 (McKinney 1972).

<sup>3</sup> 742 F.2d 67, 71.

<sup>4</sup> 26 DEP'T ST. BULL. 984 (1952).



process on the Polish Government prior to the enactment of the FSIA. Because they failed to do so, the appellants did not meet the "absent from jurisdiction" test under the New York statute of limitations.

Appellants also argued that certain payments made by Poland pursuant to the 1960 Polish claims agreement, as well as other actions of the Polish Government pertaining to the notes,<sup>5</sup> constituted an acknowledgment of the debt sufficient to toll the New York statute of limitations.<sup>6</sup> The court observed, however, that under New York law, any acknowledgment of debt sufficient to toll the statute of limitations must be in writing and signed by the party to be charged.<sup>7</sup> Moreover, payments made by a debtor to a creditor constitute an acknowledgment only if the debtor indicates an unequivocal intention to repay the balance.<sup>8</sup> The court found that none of the relevant actions of the Polish Government could be considered a written acknowledgment of the debt. Furthermore, the court ruled that payments made by Poland pursuant to the Polish claims agreement (a lump sum settlement arrangement) did not demonstrate an "unequivocal intention" to repay the balance owed on the defaulted treasury notes. Indeed, the court characterized Poland's position in this case as that of "an undeviatingly recalcitrant debtor."<sup>9</sup>

The *Schmidt* decision follows the more widely publicized People's Republic of China railway bond case, in which the retroactive application of the FSIA was also at issue.<sup>10</sup> Read together, these cases hold that the FSIA neither revives nor alters the actionable status of preexisting claims against foreign governments. As both decisions note, such a result is consistent with the language and legislative history of the FSIA.

Left unclear by the *Schmidt* decision, however, is the question whether a country's participation in a settlement of claims can ever constitute an acknowledgment of a debt. The court appears to suggest that while the

<sup>5</sup> According to appellants, evidence of this acknowledgment included: (1) the listing of treasury notes as Polish state debts in 1939, 1940, and 1946; (2) a 1960 letter from a Polish plenipotentiary to a U.S. Assistant Secretary of State noting Poland's intent to consider the claims of American bondholders; (3) the 1980 Warsaw meetings between the appellants' attorney and an adviser to the Polish Ministry of Finance; and (4) installment payments made by Poland via the U.S. Treasury to the appellants for their nationalized railway cars.

<sup>6</sup> In 1960, Poland and the United States concluded a treaty whereby Poland agreed to contribute \$40 million over 20 years to a fund established by the U.S. Foreign Claims Settlement Commission. See Treaty Between the Government of the United States and the Government of the Polish People's Republic Regarding Claims of Nationals of the United States, July 16, 1960, 11 UST 1953, TIAS No. 4545, 384 UNTS 169. This fund was to be used to satisfy the claims of American nationals whose property had been nationalized after the war. From 1964 to 1980, the appellants received \$88,000 from the fund as compensation for certain railway cars financed by the notes but nationalized after World War II.

<sup>7</sup> N.Y. GEN. OBLIG. LAW §17-101 (McKinney 1978).

<sup>8</sup> 742 F.2d at 72 (citing *Lew Morris Demolition Co. v. Board of Education of New York*, 40 N.Y.2d 516, 355 N.E.2d 369, 387 N.Y.S.2d 409 (1976)).

<sup>9</sup> 742 F.2d at 72.

<sup>10</sup> *Jackson v. People's Republic of China*, 596 F.Supp. 386 (N.D. Ala. 1984), summarized in 78 AJIL 675 (1984).

payments made pursuant to the Polish claims agreement will not be construed as an acknowledgment, the underlying claims agreement might be so construed. Poland escaped such a finding of acknowledgment here because the agreement took place 25 years ago, well beyond the reach of New York's statute of limitations. Similarly, the court emphasized Poland's assertion that this was a *final* settlement. Other countries party to recent lump sum agreements, however, could conceivably be presented with a different factual context. In such cases, even if claimants overcame a defense based on statute of limitations, they would have to show that the President lacked authority to conclude final claims settlement agreements—a difficult burden in view of the Supreme Court's decision in *Dames & Moore v. Regan*.<sup>11</sup>

*Immigration—interdiction of visaless aliens on the high seas—status of refugees*

HAITIAN REFUGEE CENTER, INC. v. GRACEY. 600 F.Supp. 1396.  
U.S. District Court, D.D.C., January 10, 1985.

Plaintiffs, a U.S. nonprofit organization providing counseling and other services to Haitian refugees, and two of its members, brought an action seeking declaratory and injunctive relief against defendants, the Commandant of the U.S. Coast Guard and the Commissioner of the Immigration and Naturalization Service, to stop the U.S. program of interdicting visaless aliens on the high seas. Plaintiffs contended that the interdiction program violated the rights of such aliens under the Immigration and Nationality Act of 1952 (8 U.S.C. §§1101–1503 (1982)), and the Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102 (1980)).<sup>1</sup> Plaintiffs also contended that the program failed to satisfy the “non-refoulement obligation” imposed by the United Nations Protocol Relating to the Status of Refugees<sup>2</sup> and the Universal Declaration of Human Rights.<sup>3</sup> Finally, plaintiffs argued that the program violated the 1905 Extradition Treaty between the United States and Haiti.<sup>4</sup> The U.S. District Court for the District of Columbia granted the defendants' motion to dismiss and *held* (per Richey, J.): that the relevant law afforded plaintiffs no basis for relief.

The interdiction program was initiated by the President of the United States in 1981, based on a finding that the illegal migration of undocumented aliens into the United States was “a serious national problem detrimental to the interests of the United States,” and that international

<sup>11</sup> 453 U.S. 654 (1981), summarized in 75 AJIL 954 (1981).

<sup>1</sup> The Refugee Act of 1980 amended the Immigration and Nationality Act and added an asylum provision.

<sup>2</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, TIAS No. 6577, 606 UNTS 267. The Protocol incorporates Articles 2 to 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 UST 6259, TIAS No. 6577, 189 UNTS 150.

<sup>3</sup> GA Res. 217A, UN Doc. A/810, at 71 (1948), reprinted in 43 AJIL Supp. 127 (1949).

<sup>4</sup> Treaty of Extradition, June 28, 1905, U.S.-Haiti, Art. I, 34 Stat. 2858, 2859, TS No. 447.

cooperation to intercept vessels trafficking in such migrants was a necessary and proper means of ensuring the effective enforcement of U.S. immigration laws. The President authorized the U.S. Coast Guard to interdict flag vessels of consenting foreign governments, of which Haiti was one, and to return vessels carrying illegal emigrants to their home countries. Such actions, however, were to be taken only outside U.S. territorial waters.<sup>5</sup>

Although the court recognized plaintiffs' standing to sue, it had serious reservations whether the complaint stated a cause of action. At the outset, the court rejected plaintiffs' argument that the President lacked constitutional and statutory authority to create the high seas interdiction program, noting that the Immigration and Nationality Act authorizes the President to suspend entry of any class of aliens if such entry is detrimental to the interests of the United States. The court observed that Article II of the U.S. Constitution also gives the President implied power to suspend entry of aliens, this power being "closely related to the President's undisputed, exclusive power to act 'as the sole organ of the federal government in the field of international relations.'"<sup>6</sup>

The court then found that none of the statutes or international instruments invoked by plaintiffs conferred legal rights upon aliens outside the United States. In this respect, the court observed that the asylum provision of the Refugee Act of 1980 applies exclusively to aliens "physically present in the United States or at a land border or port of entry";<sup>7</sup> that the deportation provisions of the Immigration and Nationality Act apply only to aliens "in the United States";<sup>8</sup> and that the procedural benefits of exclusion and deportation proceedings are reserved for aliens arriving "by water or by air at any port within the United States."<sup>9</sup> Plaintiffs contended that the Executive could not free itself of its procedural obligations "merely by reaching out to sea and changing the locale of its process." The court flatly rejected this contention.

As long as interdiction is within the power of the President, which it is . . . , there can be no claim that it violates the statutory "rights" of aliens in other respects merely because it frustrates the efforts of the illegal aliens to reach the point where those rights attach. Until a person has a right, there can be no denial of that right.<sup>10</sup>

Based on this analysis, the court also rejected plaintiffs' contention that the defendants' actions violated the due process requirements of the Fifth Amendment. Since the rights that plaintiffs sought to invoke did not apply

<sup>5</sup> See Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981), reprinted in 8 U.S.C. §1182 (supp. note) (1982); Exec. Order No. 12324, 46 Fed. Reg. 48,109 (1981), reprinted in 8 U.S.C. §1182 (supp. note) (1982).

<sup>6</sup> 600 F.Supp. 1396, 1400 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936)). See generally Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 965 (1982) (for almost a century, the Supreme Court has been virtually unvarying in its evaluation of the federal Government's power to exclude).

<sup>7</sup> 8 U.S.C. §1158(a) (1982).

<sup>8</sup> 8 U.S.C. §§1251, 1253(a) (1982).

<sup>9</sup> 8 U.S.C. §1221 (1982).

<sup>10</sup> 600 F.Supp. at 1404.

to aliens outside the United States, then "[p]lainly, . . . the . . . Haitians have no Fifth Amendment rights."<sup>11</sup>

Finally, the court found that neither the United Nations Protocol Relating to the Status of Refugees nor the Universal Declaration of Human Rights provided a basis for relief. With respect to the former, the court observed that the Protocol is not self-executing; and although it has been implemented in part by Congress in the Refugee Act of 1980, that statute provides no rights to aliens outside the United States. As for the Universal Declaration, the court noted that it "is merely a nonbinding resolution, not a treaty."<sup>12</sup> Similarly, the court concluded that the 1905 Extradition Treaty between the United States and Haiti, as well as the federal extradition statute (18 U.S.C. §3181 *et seq.* (1982)) could provide relief only to Haitians in the United States. Neither applied to defendants' activities on the high seas.

This decision illustrates that the international law of human rights does not uniformly address what may well be the most important consideration for a refugee: obtaining access to a land of refuge.<sup>13</sup> To date, this question is left to each country's national laws for resolution. Previous judicial decisions in this area have focused primarily on the rights of aliens who are within the jurisdiction of the United States but have thus far been denied permission to enter the country legally.<sup>14</sup> As the courts have not agreed upon the rights of such aliens, it is hardly surprising that the court in this case was unwilling to venture into *terra incognita* in the absence of clear international legal standards or obligations.

*Constitutional law—political question—cruise missile deployment—Alien Tort Claims Act*

GREENHAM WOMEN AGAINST CRUISE MISSILES v. REAGAN. 591 F.Supp. 1332.

U.S. District Court, S.D.N.Y., July 31, 1984.

Plaintiffs, United Kingdom citizens, a U.S. citizen resident in London and two U.S. congressmen, brought suit to enjoin the United States from deploying ground-launched cruise missiles at a U.S. Air Force base located near London. Defendants moved pursuant to Federal Rule of Civil Procedure 12(b) to dismiss the complaint on the grounds of lack of subject matter jurisdiction, ripeness and standing. The U.S. District Court for the

<sup>11</sup> *Id.* at 1405 (citing *Landon v. Plascencia*, 459 U.S. 21, 32 (1982)); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972); *Galvan v. Press*, 347 U.S. 522, 530-32 (1954)).

<sup>12</sup> 600 F.Supp. at 1406.

<sup>13</sup> International law imposes no obligation to grant asylum to refugees. See Weis, *The Development of Refugee Law*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, MICH. Y.B. OF INT'L LEGAL STUD. 27, 39 (1982). See also Young, *Between Sovereigns: A Reexamination of the Refugee's Status*, in *id.* at 339-70; Comment, *The Dilemma of the Sea Refugee: Rescue without Refuge*, 18 HARV. INT'L L.J. 577, 585-87 (1977).

<sup>14</sup> See, e.g., *Jean v. Nelson*, 727 F.2d 957 (11th Cir.), cert. granted, 105 S.Ct. 563 (1984), argued, Mar. 25, 1985, 53 U.S.L.W. 3714 (No. 84-5240).

Southern District of New York (per Edelstein, J.) dismissed the complaint and *held*: that the suit presented a nonjusticiable political question not appropriate for judicial resolution.

This suit stemmed from President Reagan's decision to deploy 96 cruise missiles capable of carrying nuclear warheads in the United Kingdom as a counterbalance to the Soviet Union's deployment of intermediate-range nuclear missiles capable of striking various NATO allies. Plaintiffs contended that deploying the cruise missiles created a substantial risk of either a nuclear war or a nuclear accident, in violation of five customary norms of international law.<sup>1</sup> Plaintiffs further alleged that the deployment constituted a tortious injury under the Alien Tort Claims Act (28 U.S.C. §1350) (1982) and violated their rights under the Fifth and Ninth Amendments to the U.S. Constitution. The congressmen also claimed that the deployment violated their constitutional rights as members of Congress to declare war and to provide for the common defense and welfare.

Although defendants sought dismissal for lack of subject matter jurisdiction, the court approached the case as one involving novel issues of law requiring a determination on the applicability of the political question doctrine. Relying on Justice Brennan's analysis in *Baker v. Carr*,<sup>2</sup> the court stated that a nonjusticiable political question involves one or more of the following six circumstances:

- (1) a textually demonstrable constitutional commitment of the issue in dispute to a coordinate political department;
- (2) a lack of judicially discoverable and manageable standards for resolving the dispute;
- (3) inability to decide the dispute without an initial policy determination of a kind clearly intended for nonjudicial discretion;
- (4) impossibility of a court to resolve the dispute independently without expressing a lack of respect due to coordinate branches of government;
- (5) the existence of an unusual need for unquestioning adherence to a political decision already made; or
- (6) the likelihood of embarrassment from multifarious pronouncements by various government departments on one question.

The court found that the case did not involve an issue committed by the Constitution to a government branch other than the judiciary. According to the court, plaintiffs did not challenge the wisdom or efficiency of deploying missiles in the United Kingdom, nor did the suit challenge the propriety of U.S. foreign policy. Rather, the plaintiffs merely asked the court to determine the legality of the challenged action.

<sup>1</sup> Plaintiffs contended that deployment of the missiles would contravene provisions of the United Nations Charter regarding the threat or use of force, the right to survival, crimes against peace, laws of war and the crime of genocide.

<sup>2</sup> 369 U.S. 186 (1962).

In particular, they ask the court to adjudicate torts, to protect constitutional rights of citizens and of noncitizens under United States control, and to enforce the constitutional mandate of separation of powers. The Constitution commits the resolution of these issues to the courts, and not to a coordinate political department.<sup>3</sup>

However, the court found that it lacked judicially discoverable and manageable standards for resolving the dispute on the merits.<sup>4</sup> Reviewing plaintiffs' pleadings, the court observed that the case would require a determination of "whether the United States by deploying cruise missiles is acting aggressively rather than defensively, increasing significantly the risk of incalculable death and destruction rather than decreasing such risk, and making war rather than promoting peace and stability."<sup>5</sup> The court observed that it was simply incapable of determining the effect of missile deployment on world peace. Because the ultimate effects of the deployment were incapable of being known, conjecture and predictions about them were best left to the political branches of government. The court reinforced its conclusion by noting that the information pertinent to such determinations would in many instances be unavailable to or incapable of evaluation by a court.

The court also found that injunctive relief would impinge upon U.S. foreign relations and could alter the foreign and military policy of the United States with respect to its NATO allies and the Soviet Union.<sup>6</sup> In this regard, the court relied on *Pauling v. McNamara*,<sup>7</sup> wherein the U.S. Court of Appeals for the District of Columbia refused to enjoin the testing and detonation of nuclear weapons since the case did not present judicially cognizable issues.

Plaintiffs' complaint involved a novel use of the Alien Tort Claims Act and the U.S. Constitution in an attempt to change a politically controversial decision of the Reagan administration involving U.S. nuclear policy and the NATO alliance. In order to address plaintiffs' theory of tortious injury, which was based on the United Nations Charter, the Genocide Convention and various norms of war, the court would have been required to ascertain the international legal principles, if any, that pertained to the use of or reliance upon nuclear weaponry as an instrument of national

<sup>3</sup> 591 F.Supp. 1332, 1336.

<sup>4</sup> In this regard, the court relied on the decisions in *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam); *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); and *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974).

<sup>5</sup> 591 F.Supp. at 1337.

<sup>6</sup>

For instance, enjoining cruise missile deployment could engender serious discord among our allies and unravel the carefully balanced deployment scheme. It could encourage the USSR to intensify its pressure for unilateral Western concessions which would seriously erode NATO's ability to deter Moscow's growing nuclear threat or discourage Soviet willingness to reach an arms control agreement.

*Id.* at 1339.

<sup>7</sup> 331 F.2d 796 (D.C. Cir. 1963), cert. denied, 377 U.S. 933 (1964).

security. Given the intricacies of the debate over our nuclear policy and the theories of deterrence, there is little doubt that this case presented a nonjusticiable political question.

*Sovereign immunity—Foreign Sovereign Immunities Act—waiver of immunity—subject matter jurisdiction—personal jurisdiction—forum non conveniens*

TRANSAMERICAN STEAMSHIP CORP. v. SOMALI DEMOCRATIC REPUBLIC.  
590 F.Supp. 968.

U.S. District Court, D.D.C., July 23, 1984.

Plaintiff, Transamerican Steamship Corporation, sought declaratory and monetary relief against defendants, the Somali Democratic Republic (SDR) and the Somali Shipping Agency (SSA), a Somali governmental agency, for damages arising from a transaction to ship grain from the United States to Somalia. Defendants moved to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602–1611 (1982)) (FSIA), lack of personal jurisdiction and *forum non conveniens*. The U.S. District Court for the District of Columbia (per Smith, J.) dismissed the action against the SDR but permitted the suit to continue against the SSA, and *held*: (1) that the SDR was immune from jurisdiction; (2) that the SSA was not immune since it was engaged in a commercial activity having direct effect in the United States; (3) that the SSA came within the personal jurisdiction of the court; and (4) that the United States was the appropriate forum for resolving the dispute.

The shipment at issue was arranged and financed by the United States pursuant to an assistance agreement entered into by the Agency for International Development (AID) and the SDR. After the cargo was discharged in Somalia, the SSA detained plaintiff's vessel for several days and demanded that plaintiff pay \$28,312 to the Somali Embassy in Washington, D.C. in order to obtain its release. Plaintiff made the payment. After unsuccessful attempts to recover detention damages and other claims against defendants through diplomatic channels, plaintiff instituted this suit.

The first issue for the court was whether the SDR enjoyed immunity from suit in U.S. courts under the Foreign Sovereign Immunities Act. The court rejected plaintiff's argument that the SDR's involvement in the AID program fell within the Act's definition of "commercial activity." Based on the legislative history of the FSIA, which expressly refers to the potential immunity status of AID participants,<sup>1</sup> the court found that the SDR's participation in the assistance program was governmental in nature. Nor did the SDR's acceptance and retention of the "release" payments

<sup>1</sup> See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 16 (1976): "[A] foreign state's mere participation in a foreign assistance program administered by . . . [AID] is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity."

through its embassy in the United States constitute a commercial activity. The arrangement came about only because of plaintiff's difficulty in communicating with the SSA. Accordingly, the court concluded, the SDR "did not enter the marketplace in any meaningful way."<sup>2</sup>

Plaintiff also argued that various documents pertinent to the grain transaction demonstrated that the SDR had waived immunity. These included (1) a grain transfer authorization incorporating AID Regulation 11, which expressly provides that the recipient government "shall be responsible for all costs for demurrage, detention, and overtime," and (2) the ocean bill of lading, which stated that it "shall be construed according to the general maritime laws of the United States." Plaintiff argued that the legislative history of the FSIA endorsed prior judicial decisions holding that an implied waiver can occur when a foreign state agrees to apply the law of the United States to a contract.<sup>3</sup>

The court observed that the threshold difficulty with plaintiff's waiver argument derived from the legislative history of the FSIA, discussed above, indicating that AID participation is presumptively governmental in nature. The court reasoned that if Congress considered mere participation in the assistance program to constitute governmental activity, it would make little sense to base a waiver of immunity on that same activity. As far as the bill of lading was concerned, the court refused to conclude that the general maritime laws of the United States governed the transaction, since the "boilerplate" choice-of-law provision in the bill of lading might "be without legal effect."<sup>4</sup>

Contrary to its decision on the SDR's immunity, the court concluded that the SSA was not immune from jurisdiction.<sup>5</sup> The court found that the detention of plaintiff's ship by the SSA, being part of the SSA's commercial activity in Somalia, caused a "direct effect in the United States." The SSA had demanded payments as a condition for release of the ship, and it had directed that these payments be made in the United States. Plaintiff also incurred additional charges to the vessel owner in the United States. The court concluded that plaintiff suffered financial loss in the United States and that such consequences were sufficient for the court to find a "direct effect."<sup>6</sup>

The court also held that it had authority to exert personal jurisdiction over the SSA. The FSIA provides that personal jurisdiction over a foreign state exists as to every claim over which a district court has subject matter jurisdiction where proper service has been made (*see* 28 U.S.C. §1330(b)).

<sup>2</sup> 590 F.Supp. 968, 973.

<sup>3</sup> *See* H.R. REP. NO. 1487, *supra* note 1, at 18.

<sup>4</sup> 590 F.Supp. at 974.

<sup>5</sup> The SSA was considered to be an "instrumentality" of the SDR as defined in 28 U.S.C. §1603 (1982). *See* 590 F.Supp. at 975.

<sup>6</sup> The court recognized that such a broad approach could bring many acts by foreign states and their instrumentalities within the ambit of the FSIA's exceptions; however, "there are a number of other legal screening devices that protect foreign defendants from being 'forced into court in the U.S. for any alleged act relating to a commercial transaction.'" 590 F.Supp. at 976 (quoting Def. Reply Mem. at 12-13).



The court, however, did not consider this statutory provision to be dispositive. Rather, the court also required that the "minimum contacts" test be met.<sup>7</sup> The SSA argued that it had no offices, employees, real property or bank accounts in the United States and did not solicit business in the United States. The court noted, however, that the SSA had made repeated use of the U.S. mails and telecommunications systems in its dealings with plaintiff and had directed plaintiff to make the disputed payments through American banking channels. According to the court, these contacts satisfied the minimum contacts test.

The remaining issue was whether a United States court was the appropriate forum in which to resolve the dispute. In this respect, the court adopted the multi-step inquiry established in *Pain v. United Technologies Corp.*<sup>8</sup> Although Somalia provided an adequate alternative forum, and although access to evidence would not be a problem since the proof at issue was primarily documentary in nature, the court found significant contacts between the dispute and the District of Columbia. First, the events underlying the case occurred in both Somalia and the District of Columbia. Moreover, there was a general national interest in retaining the case in the United States since it arose from an AID program and since the U.S. Government had initiated the relationship between the plaintiff, the SDR and the SSA. Finally, issues of American law arose in such a way that foreign law did not predominate. In view of these considerations, the court determined that defendants did not overcome the "strong presumption in favor of plaintiff's choice of forum."<sup>9</sup>

This decision indicates that the constitutional due process requirements of *International Shoe* for personal jurisdiction apply in sovereign immunity cases and have to be scrutinized apart from the question of subject matter jurisdiction. As a consequence, the rationale underlying 28 U.S.C. §1330(b), which seemingly was intended to equate personal jurisdiction with a finding of subject matter jurisdiction plus proper service, was not adopted by the court. It should be noted, however, that in *Exchange National Bank of Chicago v. Empresa Minera del Centro del Peru S.A.*,<sup>10</sup> the U.S. District Court for the Southern District of New York ruled that section 1605(a)(2) of the FSIA was itself based on a "minimum contacts" standard. Therefore, it appears that this issue has yet to be resolved in a definitive manner.

*Forum selection—choice of law—expert opinion—Iranian Revolution—excuse for nonperformance of contract*

MCDONNELL DOUGLAS CORP. v. ISLAMIC REPUBLIC OF IRAN. 591 F.Supp. 293.

U.S. District Court, E.D. Mo., June 29, 1984.

Plaintiff, McDonnell Douglas Corporation, sought a declaratory judgment that it had no liability to defendants, the Islamic Republic of Iran and

<sup>7</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>8</sup> 637 F.2d 775 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981).

<sup>9</sup> 590 F.Supp. at 978.

<sup>10</sup> 595 F.Supp. 502 (S.D.N.Y. 1984).

agencies thereof, with respect to a contract entered into between the parties in 1975. The U.S. District Court for the Eastern District of Missouri (per Wangelin, J.) entered summary judgment for the plaintiff and *held*: (1) that under the contract's choice-of-law provision, U.S. law was to be used in resolving the dispute; (2) that the contract's forum selection clause was not mandatory and was, moreover, unenforceable due to the changes that had occurred in the Iranian legal system since the time the parties had entered into the contract; (3) that plaintiff had fulfilled all of its contractual obligations to the defendants; and (4) that, even to the extent that plaintiff's compliance with the contract was at issue, the political upheaval in Iran at the time of the Iranian Revolution excused plaintiff from fulfilling its contract obligations.

Under the contract at issue, plaintiff had agreed to supply defendants with spare parts for military aircraft. The contract stated that it "shall be subject to the laws of the United States" and that disputes "should be settled in the Iranian Courts." The contract also contained a force majeure clause stating that plaintiff would be excused from any failure or delay in performing the agreement that arose out of causes beyond the control and without the fault or negligence of plaintiff. The enumeration of such causes included, *inter alia*, "acts of the United States Government in either sovereign or contractual capacity."

Plaintiff began performance under the contract, which, by its terms, expired in November 1979. Because of political turmoil in Iran in the latter part of 1978, plaintiff became concerned about the safety of its employees located in Iran and eventually ordered their evacuation. In March 1979, the United States Air Force ordered that no further Foreign Military Sales items be released for shipment to Iran; and by November 1979, the U.S. Government officially suspended all licenses for export to Iran. Following the Air Force embargo, plaintiff suspended work under its contract.

In September 1982, plaintiff received a summons and complaint from the Islamic Court of First Instance in Iran. The complaint alleged a breach of the contract between plaintiff and defendants and sought \$6 million in damages, specific performance of the contract and payment of the costs of the lawsuit, including attorney fees. Plaintiff filed suit in U.S. district court seeking a declaratory judgment that the contract was subject to the laws of the United States, that any order or judgment issued by the courts of Iran that purported to adjudicate rights or obligations under the contract between plaintiff and defendants was null, void and without force or effect, and that plaintiff had fulfilled its contractual obligations to defendants.

The district court began by upholding the choice-of-law clause in the contract on the basis of section 1-105 of the Uniform Commercial Code (U.C.C.).<sup>1</sup> The court observed that plaintiff manufactured, sold and

<sup>1</sup> Section 1-105 of the U.C.C. provides:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the

inspected the goods within the state of Missouri and payment occurred in that state. Accordingly, the court found that "Missouri law should be applied as the forum bearing 'an appropriate relation' to the transaction" within the meaning of the U.C.C., which constituted the applicable federal law.<sup>2</sup>

With respect to the forum selection clause, defendants claimed that the parties had chosen the courts of Iran as the appropriate forum for the resolution of disputes. The defendants relied on two cases, *The Bremen v. Zapata Off-Shore Co.*<sup>3</sup> and *Scherk v. Alberto-Culver Co.*,<sup>4</sup> in which the United States Supreme Court upheld and enforced contractual forum selection clauses. The district court in the instant case sought to ascertain the intentions of plaintiff and defendants at the time they negotiated the contract. The court distinguished the *Bremen* and *Alberto-Culver* cases on the ground that the contract at issue lacked the mandatory language found in the contracts under review in those cases. The court found that use of the word "should" in the contract under review merely expressed the preference of the parties and did not give rise to a presumptively binding agreement.<sup>5</sup>

Turning to the enforceability of the forum selection clause, the court noted that even if the clause was binding, superseding events precluded enforcement of the provision. Based on an affidavit from an American who practiced law in Iran from 1960 to 1979, the court concluded that radical changes in the Iranian legal system following the Iranian Revolution rendered the system incapable of providing plaintiff with a fair adjudication in an Iranian court.<sup>6</sup>

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law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

<sup>2</sup> 591 F.Supp. 293, 298.

<sup>3</sup> 407 U.S. 1 (1972).

<sup>4</sup> 417 U.S. 506 (1974).

<sup>5</sup> The court found support for this position in the Memorial of the United States of America on the Issue of Jurisdiction of the Claims Tribunal established by the Declaration Concerning the Settlement of Claims by the Government of America and the Government of the Islamic Republic of Iran of January 19, 1981. See 591 F.Supp. at 302 n.3. The Declaration excepts from the jurisdiction of the Tribunal claims that arise under a contract "specifically providing that any disputes . . . shall be within the sole jurisdiction" of the Iranian courts. The court found persuasive the contrast between the specific and exclusive selection language contained in the Declaration and the preferential nonexclusive language of the contract at issue.

<sup>6</sup> The court noted that at the time the plaintiff had agreed to the forum selection clause, the legal system of Iran followed commercial and procedural codes modeled upon the codes of Western Europe and included courts of appellate jurisdiction and judges with substantial independence. However, subsequent to the Iranian Revolution, the Islamic Republic dissolved all courts of appeal, arranged for the replacement of all judges by Islamic seminary students and established an official anti-American stance. Based on the testimony of plaintiff's affiant that attorneys in Iran have been executed, beaten, arrested and forced to flee for defending enemies of the Islamic Republic, the court concluded that no Iranian attorney could provide independent counsel to an American company in litigation against the Iranian Government. On these and related grounds, the court concluded that plaintiff could not obtain a fair adjudication in Iran.

Finally, with respect to force majeure, the court observed that, beginning in January 1979, the designated shipper under the agreement had refused to ship goods to Iran; that because of political turmoil in Iran, plaintiff was unable to contact appropriate officials in the Iranian Government to establish a new shipper; that in November 1979, the U.S. Treasury Department promulgated the Iranian Assets Control Regulations (31 C.F.R. §535 *et seq.*), which prohibited the transfer of all property or interests in property of the Iranian Government; and that also in November 1979, the U.S. State Department refused to issue any licenses for exports to Iran. The court found that because this series of events made it both practically and legally impossible for plaintiff to perform its obligations under the contract, the force majeure clause excused performance. Indeed, the court noted, the same result would obtain in the absence of a force majeure clause, since under the U.C.C. and relevant case law, such events would excuse performance under the principle of impossibility.

The court in *McDonnell Douglas* appears to adopt the approach taken by the American arbitrators in the Iran-U.S. Claims Tribunal in analyzing the legal relevance of forum selection clauses. Although the Claims Tribunal majority has generally interpreted such clauses strictly, the American arbitrators have argued that the clauses, whether or not mandatory by their terms, are no longer binding as a result of changed circumstances in Iran.<sup>7</sup>

<sup>7</sup> See Dissenting and Concurring Opinion of Richard M. Mosk on the Issues of Jurisdiction in Case Nos. 6, 51, 68, 121, 140, 159, 254, 293 and 466, Nov. 5, 1982, reprinted in *IRANIAN ASSETS LITIGATION REP.*, Nov. 19, 1982, at 5670.

## CURRENT DEVELOPMENTS

### THE THIRTY-SIXTH SESSION OF THE INTERNATIONAL LAW COMMISSION

The 36th session of the International Law Commission was held in Geneva from May 7 to July 27, 1984 under the Chairmanship of Professor Alexander Yankov. The Commission considered six of the seven substantive items on its agenda: the Draft Code of Offences against the Peace and Security of Mankind, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, jurisdictional immunities of states and their property, international liability for injurious consequences arising out of acts not prohibited by international law, the law of the non-navigational uses of international water courses, and state responsibility. The Commission did not have time to deal with the seventh substantive topic on its agenda, relations between states and international organizations (second part of the topic). On the whole, the session was a rather productive one, both in terms of articles proposed and discussed and in terms of articles adopted by the Commission. The entire session is dealt with in some detail in the Commission's 1984 report to the General Assembly;<sup>1</sup> this Note will cover only the highlights.

#### *Draft Code of Offences against the Peace and Security of Mankind*

As discussed in the Note on the Commission's 1983 session,<sup>2</sup> this topic was referred back to the Commission in 1981 after a hiatus of some 27 years. In 1954 the Commission had submitted to the General Assembly a version of the draft code containing four articles, but the Assembly did not consider the matter ripe for further action until the passage in 1974 of the Definition of Aggression.<sup>3</sup> In 1984 the special rapporteur for this topic, Minister Doudou Thiam, submitted his second report. This report was devoted entirely to the task of elaborating a list of offenses to be contained in the draft code. The report also suggested that, for the time being at least, the scope of the code *ratione personae* be confined to the criminal responsibility of individuals, and this proposal was approved by the Commission. This definition of the subjects of the code is in line with that of the version submitted to the General Assembly in 1954. It has always been the author's view that it would be a mistake to extend the scope of the code to include states, for the reasons outlined in last year's Note.

<sup>1</sup> Report of the International Law Commission on the Work of its Thirty-sixth Session, 39 UN GAOR Supp. (No. 10), UN Doc. A/39/10 (1984) [hereinafter referred to as 1984 Report].

<sup>2</sup> McCaffrey, Current Developments Note, 78 AJIL 457, 472-75 (1984).

<sup>3</sup> Annex to GA Res. 3314 (XXIX) (1974).

The Commission has chosen to embark upon the task of elaborating the Code of Offences by drawing up a provisional list of offenses to be included. According to the Commission's 1984 report, the "first step" in this process

would be to sift the acts constituting serious breaches of international law, making an inventory of the international instruments (conventions, declarations, resolutions, etc.) which regard these acts as international crimes, and selecting the most serious of them, since not every international crime is necessarily an offence against the peace and security of mankind. Moreover, the acts selected would, at this stage, be in the raw state, independent of any rigorous terminology or classification. A precise terminology and typology would be worked on later, when all the material had been selected and determined.<sup>4</sup>

The principal basis for this work is a "compendium of relevant international instruments"<sup>5</sup> which was prepared by the Commission's secretariat. The Commission has proceeded on the basis of this document to identify a number of acts or practices as candidates for inclusion in the list of offenses but has not as yet defined any criteria for determining which of the many acts and practices covered by the instruments in the compendium qualify as "offences against the peace and security of mankind."

Nevertheless, a number of preliminary decisions were taken in the 1984 session concerning the content of the draft code *ratione materiae*. First, the Commission decided that the 1954 draft provided a sound basis for the present effort, and that the offenses covered in that instrument should be included in the code, with appropriate modifications to reflect developments since 1954.<sup>6</sup> Second, with respect to items not covered by the 1954 draft, a number of members (the Commission's official report describes it as a "general trend") favored "including colonialism, *apartheid*, and possibly serious damage to the human environment and economic aggression in the Draft Code, if appropriate legal formulations could be found."<sup>7</sup> Some members, however, registered strong opposition to including some or all of these items in the list. Third, the Commission discussed whether the code should deal with the use of atomic weapons, but reached no conclusion on this issue. While some members believed that provisions on this subject would be purely theoretical and would not, in any event, be accepted by the states possessing such weapons, others considered it inconceivable for a Code of Offences against the Peace and Security of Mankind to remain silent on the problem of nuclear weapons. This latter group believed that political difficulties should not stand in the way of elaborating a rule *de lege ferenda* on the subject. Finally, mercenarism, the taking of hostages, violence against persons enjoying diplomatic privileges

<sup>4</sup> 1984 Report, *supra* note 1, at 19.

<sup>5</sup> UN Doc. A/CN.4/368 (Apr. 13, 1983).

<sup>6</sup> The offenses covered in the 1954 draft fall into three broad categories: offenses against the sovereignty and territorial integrity of the state, crimes against humanity and offenses violating the laws and customs of war.

<sup>7</sup> 1984 Report, *supra* note 1, at 30.

and immunities, hijacking and piracy were also considered as candidates for inclusion in the code. The Commission decided not to include these items at this stage for reasons ranging from not wishing to conflict with the work of other United Nations bodies (in the case of mercenarism and terrorism) to not being convinced that the offense in question constitutes a threat to the peace and security of mankind (in the case of piracy). The Commission has thus sought to draw a clear distinction between an international crime on the one hand and an offense against the peace and security of mankind on the other.

*Status of the Diplomatic Courier and the Diplomatic Bag  
Not Accompanied by Diplomatic Courier*

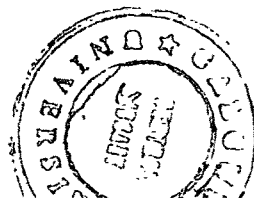
The topic on which the Commission made the most progress in its 1984 session, measured by the number of articles adopted, was the diplomatic courier and bag. However, this was achieved at the expense of further progress on other topics since the courier and bag received a disproportionate amount of time both in plenary discussion and in the Drafting Committee. The justification for this apportionment seems to be that it would be desirable for the Commission to complete work on one of the topics on its agenda within its current 5-year term, which ends in 1986.

The relevance of this topic has obviously become much more apparent and its importance more focused by recent events, including the shooting of the English policewoman from the Libyan People's Bureau in London; the abduction of the former Nigerian Transport Minister, Umaru Dikko, in London and the attempt to send him to Nigeria in a crate initially reported to have been marked as diplomatic property (this proved later not to have been the case);<sup>8</sup> and the incident involving the refusal of Swiss and German authorities to allow a Soviet truck containing nine tons of articles to be treated as a "diplomatic bag."<sup>9</sup> These incidents have served to focus already existing concerns not only about the regime of the diplomatic bag, but also about the entire field of diplomatic privileges and immunities, and have led to calls for reexamination of the 1961 Vienna Convention on Diplomatic Relations.<sup>10</sup> Legislative investigations have been undertaken in some countries, including the United Kingdom and the United States, although none has yet resulted in the passage of new domestic legislation in this area. Nevertheless, these events demonstrate that this rather dreary-sounding topic does indeed have much contemporary significance.

<sup>8</sup> See, e.g., Int'l Herald Trib., July 6, 1984, at 1; *id.*, July 7-8, 1984, at 1; *id.*, July 9, 1984, at 2; *id.*, July 10, 1984, at 2; *id.*, July 11, 1984, at 2; *id.*, July 12, 1984, at 2; and *id.*, July 14-15, 1984, at 2. On these events, see also Higgins, Editorial Comment, *supra* at p. 641.

<sup>9</sup> See, e.g., *id.*, July 17, 1984, at 2; *id.*, July 18, 1984, at 2; *id.*, July 21-22, 1984, at 2; *id.*, July 23, 1984, at 1; and *id.*, July 24, 1984, at 1 and 4.

<sup>10</sup> Owing to a misperception of the role of the Commission, the 1984 session was marked, from time to time, by the presence of reporters who asked members whether the Commission intended, at that session, to reexamine the regime of diplomatic privileges and immunities under the 1961 Vienna Convention.



Until the 1984 session, the Commission had focused its efforts principally upon the courier. In that session, the Commission began to consider the draft articles proposed by the special rapporteur, Professor Alexander Yankov, concerning the bag, or pouch. The purpose of the Commission's work on this topic is said to be twofold: (1) to consolidate the provisions concerning couriers and bags that are scattered among the four so-called Codification Conventions dealing with diplomatic law (i.e., the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions, and the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character); and (2) to fill any lacunae in those Conventions. The provisions concerning the courier and bag in those Conventions (as well as those in most bilateral treaties) leave many questions unanswered. For example, Article 27(3) of the 1961 Vienna Convention provides that "the diplomatic bag shall not be opened or detained." This is clear enough as far as it goes, but it does not reach issues such as whether the bag may be subjected to remote "screening." Similarly, Article 27(5) of the same Convention provides that "the diplomatic courier . . . shall enjoy personal inviolability and shall not be liable to any form of arrest or detention." Again, exactly what is embraced by the concept "inviolability" is far from clear.

The general approach of the special rapporteur has been to assimilate the courier to members of the administrative and technical staff of a mission, as well as to members of a special mission, and sometimes even to diplomatic agents. This has led to proposals to accord the courier full immunity from criminal and civil jurisdiction, as well as exemption from, e.g., personal examination, customs duties and inspection, dues and taxes, personal and public service, and social security. The Commission's work in this area has been guided by the principle of functional necessity, which has led the Commission to be cautious about extending the privileges and immunities of the courier and bag.

The Commission provisionally adopted 11 articles this year, all of which deal with the courier. It also referred 15 draft articles to the Drafting Committee after full discussion in plenary, 8 of which (Articles 28-35) remain to be considered by that committee. The articles provisionally adopted deal with the following subjects: nationality of the diplomatic courier (Article 9);<sup>11</sup> functions of the diplomatic courier (Article 10);

<sup>11</sup> Article 9 reads:

*Nationality of the diplomatic courier*

1. The diplomatic courier should in principle be of the nationality of the sending State.
2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the right provided for in paragraph 2 of this article with regard to:



end of the functions of the diplomatic courier (Article 11);<sup>12</sup> the diplomatic courier declared *persona non grata* or not acceptable (Article 12);<sup>13</sup> facilities (Article 13); entry into the territory of the receiving state or the transit state (Article 14);<sup>14</sup> freedom of movement (Article 15);<sup>15</sup> personal protection and inviolability (Article 16); inviolability of the temporary accommodation (Article 17); exemption from personal examination, customs duties

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- (a) nationals of the sending State who are permanent residents of the receiving State;
  - (b) nationals of a third State who are not also nationals of the sending State.

1984 Report, *supra* note 1, at 99-100.

<sup>12</sup> Article 11 reads:

*End of the functions of the diplomatic courier*

The functions of the diplomatic courier come to an end, *inter alia*, upon:

- (a) notification by the sending State to the receiving State and, where necessary, to the transit State that the functions of the diplomatic courier have been terminated;
- (b) notification by the receiving State to the sending State that, in accordance with article 12, it refuses to recognize the person concerned as a diplomatic courier.

*Id.* at 100.

<sup>13</sup> Article 12 reads:

*The diplomatic courier declared persona non grata or not acceptable*

1. The receiving State may at any time and without having to explain its decision notify the sending State that the diplomatic courier is *persona non grata* or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

[2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a diplomatic courier.]

*Id.* The second paragraph of Article 12 was placed in brackets to indicate that the Commission would revisit it after considering draft Article 28 on the duration of the courier's privileges and immunities.

<sup>14</sup> Article 14 reads:

*Entry into the territory of the receiving State or the transit State*

1. The receiving State or, as the case may be, the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

*Id.* at 101.

<sup>15</sup> Article 15 reads:

*Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or, as the case may be, the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.

*Id.*

and inspection (Article 19); and exemption from dues and taxes (Article 20).<sup>16</sup>

Article 10, dealing with the courier's functions,<sup>17</sup> raises some interesting questions and has consequences for later articles. The fundamental issue is, When does a courier begin and cease to be a courier? Strict application of the principle of functional necessity would suggest that a person is a "courier" only when accompanying, or performing functions incidental to picking up or delivering, a bag. It is not altogether clear whether this would cover an individual who has delivered one bag but is on his way—e.g., from a capital to a consulate or another capital—to pick up another bag, or on his way back to the capital of the sending state. If so, a courier would virtually always be "performing his official functions." This would have obvious implications for subsequent articles concerning privileges, immunities and exemptions, some of which provide that the relevant protections apply only when the courier is performing his official functions.

Article 13 concerning facilities<sup>18</sup> may raise some eyebrows in the protocol offices of receiving states because of the rather vague obligations it imposes. This article is based upon Article 25 of the 1961 Vienna Convention, which provides that the "receiving State shall accord full facilities for the performance of the functions of the mission" (emphasis added). This principle has been extended to the courier on the theory that the courier performs one of the functions of the mission. Some members questioned whether such a sweeping grant is necessary in light of the very brief duration of the courier's stay and his limited needs, most of which are attended to by the mission of the sending state itself.

<sup>16</sup> Article 20 reads:

*Exemption from dues and taxes*

The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or, as the case may be, in the transit State from all those dues and taxes, national, regional or municipal, for which he might otherwise be liable, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

*Id.* at 102.

<sup>17</sup> Article 10, Functions of the diplomatic courier, reads: "The functions of the diplomatic courier consist in taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him." *Id.* at 100.

<sup>18</sup> Article 13 reads:

*Facilities*

1. The receiving State or, as the case may be, the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or, as the case may be, the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

*Id.* at 101.

Paragraph 2 of Article 13 combines and consolidates provisions that had originally been proposed by the special rapporteur as separate articles. These provisions call for the receiving and transit states to assist the courier "to the extent practicable" in obtaining temporary accommodations and in establishing contact through the telecommunications system with offices of the sending state. As a practical matter, this may prove to be very difficult for many receiving and transit states to implement, either because of lack of resources or because of the number of couriers that might be in the state at any given time (including, it will be recalled, not only diplomatic couriers but also consular couriers, those of special missions and of missions to international organizations, all of whom are covered by the present draft). In any event, the commentary makes clear that paragraph 2 envisions the "exceptional case" in which unforeseen circumstances require the kinds of assistance provided for in the article.

Article 16 on personal protection and inviolability<sup>19</sup> itself raises few questions. Indeed, the second sentence of this article was taken directly from Article 27, paragraph 5 of the 1961 Vienna Convention. The commentary to Article 16, however, states that "the personal inviolability of the diplomatic courier in its scope and legal implications comes very close to that of a diplomatic agent." Some members of the Commission were of the view that this is a doubtful proposition and generally resisted the assimilation of a diplomatic courier to a diplomatic agent.

Article 17 on the inviolability of the courier's temporary accommodation<sup>20</sup> was somewhat controversial, largely in view of the fact that the article does not make this inviolability contingent upon the presence in

<sup>19</sup> Article 16, Personal protection and inviolability, reads: "The diplomatic courier shall be protected by the receiving State or, as the case may be, by the transit State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention." *Id.*

<sup>20</sup> Article 17 reads:

*Inviolability of temporary accommodation*

1. The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State, may not enter the temporary accommodation, except with the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.

2. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.

3. The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that there are in it articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier and on condition that the inspection or search be effected without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

*Id.* at 101-02.

the accommodation of the diplomatic bag. The special rapporteur took the view that the courier needs to be protected against harassment and that the inviolability of the courier's accommodation is a logical extension of his personal inviolability. The Drafting Committee could not agree on all paragraphs of this article, some members being opposed to the first paragraph but not the third and others taking the opposite view.

As originally proposed by the special rapporteur, Article 19 on exemption from personal examination<sup>21</sup> would have prohibited "examination carried out at a distance by means of electronic or other mechanical devices." Some members raised doubts about the legal basis and practical necessity for such a provision in view of the fact that even diplomatic agents customarily walk through metal-detecting devices prior to boarding aircraft. For this reason, the phrase was ultimately deleted. The commentary to this paragraph notes that the increase of, inter alia, international terrorism and air piracy has justified special measures of increased scrutiny of air passengers and their baggage, including the regular use of electronic screening devices. This logic would seem to apply equally to the diplomatic bag, as noted by some members in the 1984 session in connection with the preliminary discussion of Article 36 on the "inviolability" of the diplomatic bag. The discussion of the latter article will be concluded in the 1985 session and it will be interesting to see whether the Commission decides to address this issue directly.

#### *Jurisdictional Immunities of States and Their Property*

In his 1984 report, the special rapporteur for this topic, Ambassador Sompong Sucharitkul, proposed five new articles: Article 16, patents, trademarks and intellectual property; Article 17, fiscal liabilities and customs duties; Article 18, shareholdings and membership of bodies corporate; Article 19, ships employed in commercial service; and Article 20, arbitration. At its 1984 session, the Commission adopted three of these articles (Articles 16, 17, and 18), as well as two articles that had

<sup>21</sup> Article 19 reads:

#### *Exemption from personal examination, customs duties and inspection*

1. The diplomatic courier shall be exempt from personal examination.
2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.
3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or, as the case may be, of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

*Id.* at 102.

been proposed in 1983 (Articles 13 and 14). The present discussion will be confined to the articles provisionally adopted during the 1984 session.

Article 13 on contracts of employment<sup>22</sup> represents an attempt to strike a balance between the interest of the territorial, or forum, state and those of the employing state. Many missions rely on locally recruited employees to perform a variety of services. Article 13 recognizes the strong interest of the forum state in the protection of its local labor force, including the enforcement of social security provisions and enhancement of contributions to social security funds (the term "social security" is used in its broad sense). For this reason, paragraph 1 of Article 13 requires that the plaintiff employee be "covered by the social security provisions which may be in force in [the forum] State." On the other hand, the employer state has an interest in applying its administrative law in cases dealing with employees who perform functions related to the exercise of that state's governmental authority. This interest is recognized in paragraph 2(a), which, in essence, provides that there is no immunity if "the employee has been recruited to perform services associated with the exercise of governmental authority." However, the precise meaning of the phrase "services associated with the exercise of governmental authority" is not altogether clear. Perhaps when this article is given a second reading, a formula can be developed that will carve out areas of immunity and nonimmunity more clearly than the "social security" and "governmental authority" criteria now do. Paragraph 2(b) raises questions about whether the employer state should be immune, e.g., where an action is brought in U.S. courts by a locally recruited employee against a foreign state based upon alleged discriminatory hiring, dismissal or refusal to renew employment. Many of these problems arise

<sup>22</sup> Article 13 reads:

*Contracts of employment*

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

- (a) the employee has been recruited to perform services associated with the exercise of governmental authority;
- (b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;
- (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;
- (d) the employee is a national of the employer State at the time the proceeding is instituted;
- (e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

*Id.* at 146.

because "contracts of employment" are covered by a specific article, rather than by a more general category of "trading or commercial activities" (as is true of the U.S. legislation) or "commercial contracts" (*cf.* Article 12 of this draft, provisionally adopted at the 1983 session).

Article 14 on personal injuries and damage to property<sup>23</sup> was somewhat controversial. Like its counterpart in the Foreign Sovereign Immunities Act (FSIA),<sup>24</sup> this article is directed principally toward personal injuries and damage to property caused by individuals acting in some way on behalf of the defendant's state in the state of the forum. Traffic accidents are the most common cause of such injuries and damage. The concerns about this article expressed by some members of the Commission seemed to relate primarily to the possibility of a state's being sued for an exorbitant amount of damages.<sup>25</sup>

Article 16 on patents, trademarks and intellectual or industrial property<sup>26</sup> is related to both Article 12 on commercial contracts and Article 15 on

<sup>23</sup> Article 14 reads:

*Personal injuries and damage to property*

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

*Id.*

<sup>24</sup> See §1605(a)(5) of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602-1611 (1976).

<sup>25</sup> That this is indeed a possibility is demonstrated by the *Letelier* and *Siderman* cases. See *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *rev'g* 567 F.Supp. 1490 (S.D.N.Y. 1983); *Letelier v. Republic of Chile*, 502 F.Supp. 259 (D.D.C. 1980) (granting a default judgment against the Republic of Chile and awarding plaintiff over \$5 million in damages, including interest, compensatory and punitive damages, counsel fees and out-of-pocket expenses); and *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (MCx) (C.D. Cal. Sept. 28, 1984) (granting a default judgment and damages for pain and suffering and emotional distress, physical injuries, loss of earnings, medical expenses, and moral damages, for a total award of over \$2.5 million, as well as \$100,000 for loss of consortium), *vacated and dismissed* on grounds of sovereign immunity (C.D. Cal. Mar. 7, 1985).

<sup>26</sup> Article 16 reads:

*Patents, trade marks and intellectual or industrial property*

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

property. The subject matter of Article 16, however, constitutes a highly specialized form of property rights, and one of increasing importance in today's highly technological world. The Commission sought to employ a formulation in Article 16 that would cover all existing and future types of intellectual or industrial property, recognizing that some of the most recent forms of computer and biological technology may not fit comfortably within traditional categories. Despite its close relationship to Article 15, Article 16 was not devoid of controversy in the Commission since some members perceived that developing countries might be in some way disadvantaged by not being able to invoke immunity (1) in cases involving the kinds of rights in question in which they had an interest, or (2) in proceedings in which they were alleged to have infringed such a right. Concern was also expressed by a few members that Article 16 might in some way prejudice the extraterritorial effect of a state's nationalization of an industry within its borders, including pertinent patents, trademarks or other intellectual or industrial property, especially in view of the fact that this question could arise with respect to other articles as well (e.g., Articles 12 and 15). To meet this concern, the special rapporteur proposed that a general reservation be included in the draft as Article 11, paragraph 2, which would make clear that nothing in the draft articles would prejudice the extraterritorial effect of an expropriation by a state of intellectual or industrial property within its territory.

Article 17 on fiscal matters<sup>27</sup> is relatively straightforward. Care should be taken, however, to distinguish between immunity from *liability* for duties, taxes or other similar charges, on the one hand, and immunity from *jurisdiction* in proceedings relating to such obligations for which a foreign state is liable, on the other. The article is intended to apply only where the foreign state is actually liable for a given fiscal obligation; it would not apply where the state enjoyed some kind of exemption or dispensation.

Article 18 on participation in companies or other collective bodies<sup>28</sup> was broadly acceptable to the Commission, most members agreeing that

<sup>27</sup> Article 17 reads:

*Fiscal matters*

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State in a proceeding relating to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

*Id.*

<sup>28</sup> Article 18 reads:

*Participation in companies or other collective bodies*

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

if a state voluntarily participates in a corporation, partnership or other unincorporated association, it in effect thereby voluntarily waives immunity in any proceeding relating to such participation. Article 18 closely tracks Article 8 of the British State Immunity Act of 1978<sup>29</sup> and is also consistent with Article 6 of the European Convention on State Immunity.<sup>30</sup> The alternative requirement of paragraph 1(b) that the business entity in question be "controlled from" the forum state was somewhat problematic for some members. It was presumably intended to prevent those doing business in the form of one of these kinds of bodies from evading the laws of a particular country through the simple expedient of incorporating under the laws of another country.

The Commission was unable, owing to lack of time, to conclude its preliminary discussion of Article 19 on ships employed in commercial service. This article, along with Article 20 on arbitration, will be taken up by the Commission at its 1985 session.

*International Liability for Injurious Consequences Arising out of  
Acts not Prohibited by International Law*

The writer deeply regrets having to report the death on September 24, 1984, of Professor Robert Quentin-Baxter, special rapporteur on international liability and member of the International Law Commission since 1972. Professor Quentin-Baxter's untimely passing is mourned by his colleagues in the United Nations and the international legal community. In his capacity as special rapporteur, Professor Quentin-Baxter made a lasting contribution of enormous value to the codification and progressive development of international law.

In his fifth report, Professor Quentin-Baxter proposed five introductory articles dealing with such matters as scope, use of terms, and relationship to other agreements and other rules of international law. These articles closely track the "Schematic Outline" contained in Professor Quentin-Baxter's 1982 report. At the suggestion of the special rapporteur, these articles were not sent to the Drafting Committee and they will therefore be given continued consideration when the Commission next takes up this topic. Article 1 on the scope of the draft provides as follows: "These draft articles apply with respect to activities and situations which are within the territory or control of a State, and which do or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory

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(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

*Id.*

<sup>29</sup> State Immunity Act 1978, ch. 33, reprinted in 17 ILM 1123 (1978).

<sup>30</sup> European Convention on State Immunity, 1972 ETS 74.



or control of any other State." This article contains three elements or conditions: the first is the "transboundary element," i.e., the effects on one state must be produced by activities or situations that are within the territory or control of another state; the second element is that of a "physical consequence"; and the third is that the physical consequence must have an effect upon use and enjoyment, i.e., "it must be shown . . . that the physical consequence—to use the words of the award in the *Lake Lanoux* tribunal—'change[s] a state of affairs organized for the working of the requirements of social life' in another State."<sup>31</sup> These elements or conditions were generally acceptable to the Commission although they did raise some questions. For example, it was asked whether the use of the word "areas" meant that personal injury was outside the scope of the topic. The special rapporteur answered this question in the negative. Another point of interest was whether and to what extent the transboundary element would be satisfied where an industry was established in a developing country by a company headquartered in a developed country.<sup>32</sup> The special rapporteur again generally answered in the negative, while acknowledging that developing countries are concerned that this kind of situation be provided for in some way.

#### *Non-navigational Uses of International Watercourses*

It will be recalled that the special rapporteur for this topic, Ambassador (now Judge) Jens Evensen, submitted an entire draft convention in his first report in 1983. In his second report, he resubmitted the full set of articles, with several key changes. The most important of these changes are the elimination of the "system" and "shared natural resource" concepts.

The "system" concept had been the cornerstone of the Commission's work on international watercourses and served as an alternative to the "drainage basin" approach of the Helsinki Rules,<sup>33</sup> which had been politically controversial. The special rapporteur concluded, however, that the system approach suffered from similar defects since it "had been viewed as being too vague, as introducing a legal superstructure from which unforeseen principles might be inferred and as placing undue emphasis on land areas."<sup>34</sup> Consequently, the term "system" has disappeared from the articles as presented in 1984. In its stead, the draft speaks simply of "international watercourses" (Art. 1), "watercourse States" (Art. 3) and "watercourse agreements."

This change received mixed reviews from Commission members. Some thought it merely cosmetic, while others viewed it as signaling a major departure from the approach the Commission had decided to follow. Still

<sup>31</sup> 1984 Report, *supra* note 1, at 183.

<sup>32</sup> The Bhopal disaster will doubtless provide grist for future discussions of this issue.

<sup>33</sup> INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SECOND CONFERENCE HELD AT HELSINKI, 1966, at 484 (1967).

<sup>34</sup> 1984 Report, *supra* note 1, at 213.

other members found the abandonment of the "system" approach to be a positive and constructive step that eliminated a major obstacle to further progress.

The second major change introduced in the 1984 draft was the abandonment of the concept that an international watercourse is a "shared natural resource." This notion, embodied in the 1983 version of Article 6,<sup>35</sup> had been more controversial than the "system" concept because it was viewed in some quarters as implying a right of veto over proposed projects in other riparian states. The new version of Article 6 is entitled "General principles concerning the sharing of the waters of an international watercourse," and reads as follows:

1. A watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

2. To the extent that the use of the waters of an international watercourse within the territory of one watercourse State affects the use of the waters of the watercourse in the territory of another watercourse State, the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner in accordance with the articles of this Convention and other agreements and arrangements entered into with regard to the management, administration or uses of the international watercourse.

This version of the article sets forth more clearly than its predecessor the operative principles governing the use by coriparian states of international watercourses, namely, that the waters and benefits flowing from them shall be utilized and apportioned in a reasonable and equitable manner.

The reactions of Commission members to the deletion of the "shared natural resource" concept varied. Some members viewed its removal as a major improvement since they regarded the concept to be pregnant with dangerous implications. Others objected to the elimination of the term, essentially on the ground that its absence would prejudice the position of downstream states. Still others doubted whether the article should contain any reference to sharing at all, in view of what they considered to be the indefinite meaning of that term.

The Commission decided to refer Articles 1-9 of the 1984 draft to the Drafting Committee for action in light of the comments made in plenary discussion.<sup>36</sup> That committee, however, did not have time to consider those articles during the Commission's 1984 session. The situation is somewhat complicated by the fact that the special rapporteur was elected to the International Court of Justice in the fall of 1984 and, as a result, resigned his position on the Commission. The topic is thus once again without a rapporteur, a situation that will be rectified, it is hoped, in the

<sup>35</sup> It is also found in the former Article 5 adopted by the Commission in 1980, which is reproduced in *id.* at 200.

<sup>36</sup> The Commission also authorized the Drafting Committee to draw upon the texts provisionally adopted at the 1980 session as well as Articles 1-9 of the special rapporteur's 1983 draft. *Id.* at 208 n.264.

1985 session. Nevertheless, even if a new rapporteur is selected, there will be no report on watercourses for 1985 and it is uncertain whether the Drafting Committee will be able to proceed with Articles 1-9 during that session.

### *State Responsibility*

The special rapporteur for this topic, Judge Willem Riphagen, submitted 12 new draft articles in his 1984 report, which constitute the remainder of part 2 of the draft. The first two of these new articles (Articles 5 and 6) were referred to the Drafting Committee after discussion by the full Commission. Thus, the Commission adopted no new articles on state responsibility in 1984; but the fact that the whole of part 2 is now before it is a major step forward.

Perhaps the key provision in this new set is Article 5, which defines the "injured state."<sup>37</sup> Articles 6-9 set forth the remedies available to the injured state in the form of reparation, reciprocity and reprisal. Articles 10-16 contain, for the most part, limitations on Articles 6-9 that take into account such matters as self-defense, obligations under diplomatic law, the treatment of aliens, obligations under multilateral treaties and the provisions of the UN Charter concerning the maintenance of international peace and security.

Most of the discussion in the Commission focused on Article 5 and related provisions. The paragraphs of that article receiving the most attention were those dealing with multilateral treaties (para. (d)) and international crimes (para. (e)), the latter being by far the more controversial. While the special rapporteur explained that Article 5(e) was based

<sup>37</sup> Article 5 reads:

For the purposes of the present articles "injured State" means:

(a) if the internationally wrongful act constitutes an infringement of a right appertaining to a State by virtue of a customary rule of international law or of a right arising from a treaty provision for a third State, the State whose right has been infringed;

(b) if the internationally wrongful act constitutes the breach of an obligation imposed by a judgement or other binding dispute settlement decision of an international court or tribunal, the other State party or States parties to the dispute;

(c) if the internationally wrongful act constitutes a breach of an obligation imposed by a bilateral treaty, the other State party to the treaty;

(d) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty, a State party to that treaty, if it is established that:

(i) the obligation was stipulated in its favour, or

(ii) the breach of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties, or

(iii) the obligation was stipulated for the protection of collective interests of the States parties, or

(iv) the obligation was stipulated for the protection of individual persons, irrespective of their nationality;

(e) if the internationally wrongful act constitutes an international crime, all other States.

*Id.* at 237 n.299.

on the characterization of international crimes by the Commission and the International Court of Justice as violations of obligations *erga omnes*, some members thought a distinction should be drawn between the rights of directly affected states and those of other members of the international community. Other members questioned the very existence of a separate category of internationally wrongful acts denominated "international crimes." These members and others, for different reasons,<sup>38</sup> were of the view that paragraph (e) should be deleted.

STEPHEN C. MCCAFFREY\*

#### PROPOSED AMENDMENT OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

##### *The Mathias Bill*

Senator Charles McC. Mathias (R., Md.) recently introduced legislation<sup>1</sup> to amend the Foreign Sovereign Immunities Act (FSIA)<sup>2</sup> of 1976. These amendments, which are based on proposals adopted by the House of Delegates of the American Bar Association in August 1984,<sup>3</sup> are intended to increase the usefulness of the FSIA as a litigation tool for parties pursuing claims and counterclaims in U.S. courts against foreign governments and their agencies.

As the hearings on the Mathias bill will be the first hearings on the FSIA since its enactment in 1976, they will give the executive branch its first formal opportunity to review judicial construction of the Act.<sup>4</sup> Thus, the hearings will undoubtedly touch upon many provisions of the FSIA. While the executive branch's testimony will not become legislative history for any provisions other than the amendments that may be made this year, courts may look to this testimony when interpreting the Act. Accordingly, the FSIA hearings will be significant not only as necessary groundwork for the proposed amendments but also as a future reference for courts interpreting a wider range of questions under the Act.

<sup>38</sup> Some members believed that a separate chapter should be devoted to the consequences of international crimes since they constituted a "self-contained regime."

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<sup>1</sup> S. 1071, 99th Cong., 1st Sess., 131 CONG. REC. S5363 (daily ed. May 3, 1985). See the Appendix to this Note for the text of the proposed amendments to the Foreign Sovereign Immunities Act.

<sup>2</sup> 28 U.S.C. §§1330, 1602-1611 (1982).

<sup>3</sup> Copies of the ABA proposals and ABA action on them are available from the American Bar Association, Section of International Law, 1800 M Street, N.W., Washington, D.C. 20036.

<sup>4</sup> Of course, the executive branch has stated its position on various provisions of the FSIA in amicus briefs. See, e.g., Brief for the United States as *Amicus Curiae*, reprinted in 20 ILM 161 (1981), in *Libyan American Oil Co. [LIAMCO] v. Libya*, 684 F.2d 1032 (D.C. Cir. 1981); see also Statement of Interest of the United States, reprinted in 22 ILM 1077 (1983), in *Jackson v. People's Republic of China*, 550 F.Supp. 869 (N.D. Ala. 1982).

For example, the hearings could consider issues involved in discovery requests against foreign sovereigns and enforcement sanctions under the Act, a topic that is not explicitly addressed in the FSIA or the proposed amendments. American discovery attempts against foreign nonsovereign defendants have often produced conflicts with friendly governments. Many governments have objected to the wide U.S. definition of discoverable material and considered U.S. extraterritorial discovery efforts to be violations of their nation's sovereignty. As a result, over 20 nations have enacted legislation to prevent U.S. discovery attempts in their territory.<sup>5</sup>

In comparison to the conflict precipitated by U.S. discovery attempts against foreign nonsovereign defendants, discovery efforts directly against foreign state defendants are likely to generate even more friction. The usual rules of discovery and sanctions for failure to respond to discovery requests are being applied in suits against foreign sovereigns under the FSIA.<sup>6</sup> More thought needs to be given to this issue, particularly since the range of suits being brought against foreign governments involves some highly politicized issues such as terrorism and torture. At a minimum, the United States should not apply discovery rules it is not willing to have applied against itself by foreign states. This issue should be addressed in the hearings on the proposed amendments.

The Mathias amendments deal with the effect of arbitration agreements on sovereign immunity, limitations on the defense of act of state in expropriation and breach of contract cases, prejudgment attachments of foreign governmental agency property, execution of judgments on commercial property of foreign governments and their agencies, admiralty claims against foreign governmental shipping and treatment of governmental loan transactions as commercial activity not entitled to sovereign immunity under the Act. After placing these proposals in the context of the current law, applicable judicial decisions and foreign state practice, this Note will discuss the relevance of several recent decisions interpreting the FSIA to the proposed amendments.

*Agreements to Arbitrate.* In accord with generally accepted principles, the proposed amendment to FSIA section 1605(a) would remove sovereign immunity where there is a suit against a governmental entity to enforce an arbitration agreement or award. The amendment would remove immunity in actions to enforce the agreement or the resultant award if

(A) the arbitration takes place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, or (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court.

<sup>5</sup> See Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. INT'L L.J. 247 (1982).

<sup>6</sup> For example, at least one court has issued findings of fact against a foreign governmental agency as a sanction for that agency's failure to respond to discovery requests. *Wyle v. Bank Melli of Iran*, 577 F.Supp. 1148, 1153 (N.D. Cal. 1983).

The legislative history would indicate that the treaties and international agreements referred to by this amendment include, inter alia, the Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention),<sup>7</sup> the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention),<sup>8</sup> and bilateral claims settlement agreements such as the U.S.-Iran Claims Settlement Agreement (the Claims Settlement Agreement).<sup>9</sup> Since there are more than 50 signatories to the New York Convention, a large number of arbitration sites would be covered by the proposed arbitration amendment. Any arbitration agreement would be entitled to the effect of this provision if it either provided for arbitration in a state in which the New York Convention was in force or left the place of arbitration to be selected by arbitrators who were free to pick a New York Convention state.

To evaluate the effect of the Mathias proposal on enforcement of agreements to arbitrate and arbitral awards involving foreign states and state agencies, it is necessary to review the current provisions of the FSIA on this point. The FSIA is structured so that a court can exercise jurisdiction over foreign state defendants in either of two situations: (1) under section 1605(a)(1), if a foreign state expressly or implicitly waives its immunity; and (2) under the other provisions of section 1605(a), if a state engages in certain activities that have prescribed effects in the United States, in which case immunity is withdrawn. While Congress attached various territorial nexus prerequisites to the second category of activities, it did not apply these requirements to express or implied waivers of immunity.<sup>10</sup> Although the FSIA does not define implied waiver, the 1976 legislative history of section 1605(a)(1) of the FSIA indicates that a government's agreement to arbitrate in another country, or an agreement that foreign law should govern a contract, should be treated as an implied waiver of sovereign immunity.<sup>11</sup> However, the few courts that have construed this legislative history have not reached consistent interpretations.<sup>12</sup> The draft *Restatement of Foreign Relations Law (Revised)*, relying on

<sup>7</sup> June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 3.

<sup>8</sup> Mar. 18, 1965, 17 UST 1270, TIAS No. 6090, 575 UNTS 159.

<sup>9</sup> Jan. 14, 1981, reprinted in 75 AJIL 422 (1981), 20 ILM 223 (1981).

<sup>10</sup> See 28 U.S.C. §1605(a)(1) (1982).

<sup>11</sup> H.R. REP. NO. 1487, 94th Cong., 2d Sess. 18 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6617.

<sup>12</sup> Compare *Libyan Am. Oil Co. [LIAMCO] v. Libya*, 482 F.Supp. 1175 (D.D.C. 1980), vacated mem., 684 F.2d 1032 (D.C. Cir. 1981); *Ipirade Int'l v. Nigeria*, 465 F.Supp. 824 (D.D.C. 1978) with *Maritime Int'l Nominees Establishment [MINE] v. Guinea*, 693 F.2d 1094 (D.C. Cir. 1982); *Ohntrup v. Firearms Center Inc.*, 516 F.Supp. 1281 (E.D. Pa. 1981); *Verlinden B.V. v. Central Bank of Nigeria*, 488 F.Supp. 1284 (S.D.N.Y. 1980), aff'd on other grounds, 647 F.2d 320 (2d Cir. 1981), rev'd, 461 U.S. 480 (1983).

The court of appeals in *MINE* concluded that the relevant arbitration agreement was not an implicit waiver of immunity because plaintiff *MINE's* prior litigation position (arguing that U.S. courts were not intended to enforce the agreement) precluded it from asserting that U.S. courts were intended to enforce the agreement. 693 F.2d at 1103. The court in *Ohntrup* concluded that an agreement to arbitrate before the "Paris International Court"

some of those opinions, treats an agreement to arbitrate as a waiver of immunity in an action to enforce both the agreement and any resultant award.<sup>13</sup>

The Mathias amendment would give statutory confirmation that agreements to arbitrate remove sovereign immunity in subsequent actions to enforce the agreement or the resultant award.<sup>14</sup> Rather than treating agreements to arbitrate as implied waivers of immunity, the proposal explicitly removes immunity whenever an arbitration agreement falls within the criteria specified in the amendment. The proposed amendment, therefore, does not necessarily restrict the current effect of FSIA section 1605(a)(1), which provides that a state can implicitly waive its immunity to *any* action in U.S. courts. It should be made clear that arbitration agreements that do not meet the criteria of the proposed amendment to FSIA section 1605(a)(6) can still be enforced as implied waivers of immunity under section 1605(a)(1).

It may also be desirable that the legislative history of the Mathias proposal state clearly how the section 1605(a)(6) amendment is to be construed with respect to an arbitration agreement arising under the ICSID Convention, the World Bank-sponsored arrangement for the arbitration and settlement of investment disputes. The ICSID Convention establishes a "rule of abstention" to avoid judicial review of any dispute subject to the Convention until an ICSID award is issued.<sup>15</sup> As an international treaty obligation, the ICSID procedure on enforcement of an agreement to arbitrate should be followed. As for enforcement of arbitral awards, the Mathias provision should provide useful support to an award arrived at in an ICSID arbitration.

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was not an implicit waiver of immunity in an action on the underlying claim because "a waiver of immunity by a state as to one jurisdiction cannot be interpreted to be a waiver as to all jurisdictions." 516 F.Supp. at 1285. In refusing to conclude that an agreement to arbitrate was an implied waiver of immunity in an action in U.S. court, the district court in *Verlinden* noted that "Congressional history cited by the plaintiff is not dispositive of this issue, indeed, it is at most ambiguous." 488 F.Supp. at 1301.

<sup>13</sup> RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §497 Reporters' Note 8, at 158 (Tent. Draft No. 4, 1983) (citing *LIAMCO* and *Ipitrade* for support).

<sup>14</sup> A subsidiary issue is whether constitutional "minimum contacts" are required in an action to enforce an arbitral award or agreement. The U.S. Government has concluded that there is no constitutional problem of contacts with the forum in enforcing arbitral awards pursuant to the implied waiver provision in FSIA §1605(a)(1):

"Contacts" between the defendant and the United States are not required where the judgment sought is not an adjudication *ab initio* on the merits but rather the enforcement of an award rendered in a foreign jurisdiction where the defendant had the opportunity to appear and contest the entry of judgment.

Brief for the United States as *Amicus Curiae*, *supra* note 4, at 36, 20 ILM at 163. See also Olmstead, *Enforcement of a Foreign Arbitral Award against a Government—A Catch 22*, 1981 PRIVATE INVESTORS ABROAD 213, 225.

<sup>15</sup> "Under the Convention, the sole role assigned to domestic courts relates to the recognition and enforcement of ICSID awards." Delaume, *ICSID Arbitration and the Courts*, 77 AJIL 784, 785 (1983).

The Mathias proposal would bring U.S. law on the effect of arbitration agreements on sovereign immunity closer to the practice of other states. The British State Immunity Act provides that "[w]here a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."<sup>16</sup> The Governments of South Africa,<sup>17</sup> Singapore<sup>18</sup> and Pakistan<sup>19</sup> have recently promulgated state immunity acts with very similar provisions regarding the effects of agreements to arbitrate.<sup>20</sup>

Given the conflicting judicial opinions regarding the effect of sovereign immunity on an agreement to arbitrate, enactment of the Mathias proposal should increase the usefulness of arbitration agreements with foreign states and state agencies. During the legislative process, it can be made clear that the amendment does not lift sovereign immunity and permit court review of the underlying controversy. The integrity of the arbitral process would be preserved, while the judiciary would ensure that the agreement to arbitrate and the arbitral award would be enforced.

*Act of State.* A Mathias amendment to FSIA section 1606 would curb use of the act of state defense by foreign states and state agencies in expropriation and breach of contract cases. The proposal would bar application of the act of state doctrine

on behalf of a foreign state with respect to any claim or counterclaim asserted pursuant to the provisions of this chapter which is based upon an expropriation or other taking of property, including contract rights, without the payment of prompt, adequate, and effective compensation or otherwise in violation of international law or which is based upon a breach of contract, nor shall such doctrine bar enforcement of an agreement to arbitrate or an arbitral award rendered against a foreign state.

The amendment applies only where a foreign state or its instrumentality asserts the act of state doctrine. The proposal would not affect private party assertions of the act of state doctrine in cases between private parties such as *Hunt v. Mobil Oil Corp.*<sup>21</sup> Nor would the amendment apply to a case not involving an expropriation or breach of contract such as *International Association of Machinists and Aerospace Workers v. OPEC*.<sup>22</sup> The *Sabbatino* amendment,<sup>23</sup> of course, could overcome either governmental or private

<sup>16</sup> State Immunity Act 1978, ch. 33, §9(1), reprinted in 17 ILM 1123 (1978).

<sup>17</sup> Foreign Sovereign Immunity Act, 1981, reprinted in MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 34, UN Doc. ST/LEG/SER.B/20 (1982).

<sup>18</sup> State Immunity Act of 1977, reprinted in *id.* at 28.

<sup>19</sup> State Immunity Ordinance, 1981, reprinted in *id.* at 20.

<sup>20</sup> The Canadian State Immunity Act of 1982, ch. 95, reprinted in 22 ILM 798 (1982), does not expressly address the effect of arbitration agreements as waivers of immunity.

<sup>21</sup> 550 F.2d 68 (2d Cir.), summarized in 71 AJIL 780 (1977), cert. denied, 434 U.S. 984 (1977).

<sup>22</sup> International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F.Supp. 553 (C.D. Cal.), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

<sup>23</sup> 22 U.S.C. §2370(e)(2) (1982).



party assertions of the act of state doctrine in litigation where the fruits of an expropriation are at stake.

The current FSIA provisions dealing with litigation arising from expropriation are limited. Section 1605(a)(3), the only explicit provision removing sovereign immunity as a bar to jurisdiction in expropriation cases, eliminates sovereign immunity in cases

in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

These provisions have rarely been invoked by U.S. litigants since expropriating governments have been cautious about marketing expropriated property in the United States.<sup>24</sup> However, the provision permitting suit against an agency or instrumentality holding expropriated property may provide greater opportunities than U.S. litigants have realized, and it is important that the act of state defense be eliminated from such cases. Such possibilities can only be explored through extensive discovery. It is likely that a hostile foreign governmental agency holding expropriated property abroad would refuse to answer such discovery. Here the issue of sanctions such as adverse findings or even a default judgment under Federal Rule of Civil Procedure 37, subject to court review under FSIA section 1608, would undoubtedly become a central issue.

Although the Mathias proposal deprives foreign governments of the ability to assert the act of state doctrine in expropriation and breach of contract cases, the need to show jurisdiction and to find a basis to overcome a sovereign immunity defense in such cases remains. FSIA section 1605(a)(2)(iii) appears to be relevant in some cases since it removes sovereign immunity in cases based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." The concepts of "commercial activity" and "direct effect" have been litigated with increasing frequency and with varying results in U.S. courts. These concepts are discussed further below.

Since FSIA section 1605(a)(3) on expropriation is limited in scope and the section 1605(a)(2)(iii) commercial activity/direct effect exception still has limited application for U.S. claimants seeking reimbursement for expropriated property,<sup>25</sup> the greatest impact of the Mathias act of state proposal is likely to be in cases involving a counterclaim for expropriation. Under the FSIA counterclaim provision, section 1607, a state cannot

<sup>24</sup> See *Sanchez v. Banco Central de Nicaragua*, 515 F.Supp. 900 (E.D. La. 1981) (rare case accepting jurisdiction under §1605(a)(3)).

<sup>25</sup> See *Carey v. National Oil Corp.* (S.D.N.Y.), *aff'd*, 592 F.2d 673 (2d Cir. 1979) (declining jurisdiction because of no direct effect within the United States).

maintain its sovereign immunity defense against certain counterclaims.<sup>26</sup> However, at present states are using the act of state doctrine to defeat expropriation counterclaims, while pressing their own suits against U.S. defendants.<sup>27</sup> The Mathias proposal will prevent this inequitable result.

The proposal also prevents a state's use of the act of state doctrine as a defense to actions based upon a breach of contract. Essentially, this proposal follows the plurality Supreme Court opinion in *Dunhill*,<sup>28</sup> calling for a commercial exception to the act of state doctrine. The proposal eliminates the possibility that a foreign state or state agency could be deprived of sovereign immunity for commercial acts, yet avoid liability for those same commercial acts by claiming that repudiation of the debt was an act of state. The proposal thus fulfills the original intention of Congress in enacting the FSIA to make foreign states fully responsible for their commercial undertakings.

The Mathias proposal would also prevent use of the act of state doctrine to bar "enforcement of an agreement to arbitrate or an arbitral award rendered against a foreign state." The policy objectives of the act of state doctrine are not implicated in an action to enforce an arbitral agreement or award since the courts are not being asked to review the merits of the arbitral agreement or decision.<sup>29</sup> Since the act of state doctrine has been misapplied in at least one case to bar the enforcement of an arbitral award,<sup>30</sup> this provision is necessary to prevent a repetition of such an outcome in litigation on this issue.

*Prejudgment Attachment.* The Iranian claims litigation during 1978-1980 demonstrated the gaps in current U.S. law on prejudgment attachments of foreign state or agency property.<sup>31</sup> Under the FSIA at present no such relief is available absent explicit waiver.<sup>32</sup> Although litigants argued that the Treaty of Amity, Economic Relations, and Consular Rights with Iran contained such a waiver, this issue was never definitively resolved.<sup>33</sup> The danger remains that a foreign state or its agency could remove its assets from the jurisdiction with impunity absent some general freeze order such as was used with the Iranian assets. Although governments themselves may be unlikely to remove all their assets, governmental agencies present a far greater likelihood of removal of assets to avoid levies.

<sup>26</sup> 28 U.S.C. §1607 (1982).

<sup>27</sup> See, e.g., *Empresa Cubana Exportadora de Azucar y sus Derivados v. Lamborn & Co.*, 652 F.2d 231 (2d Cir. 1981).

<sup>28</sup> *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

<sup>29</sup> The policy objectives of the modern act of state doctrine were established in the Supreme Court decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). See Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964).

<sup>30</sup> See *LIAMCO*, 482 F.Supp. 1175 (D.D.C. 1980).

<sup>31</sup> See Note, *Prejudgment Attachment of Frozen Iranian Assets*, 69 CALIF. L. REV. 837 (1981); Note, *Prejudgment Attachment of Iranian Assets in the United States: Waiving Sovereign Immunity*, 13 N.Y.U.J. INT'L L. & POL. 675 (1981).

<sup>32</sup> 28 U.S.C. §1610(d)(1) (1982).

<sup>33</sup> See *Electronic Data Sys. Corp. v. Social Sec. Org. of the Gov't of Iran*, 610 F.2d 94 (2d Cir. 1979); *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F.Supp. 724 (S.D.N.Y. 1979).

The Mathias proposal would resolve this problem by allowing prejudgment attachments of property of a foreign agency or instrumentality, but retaining the existing requirement for explicit waiver for prejudgment attachment of government property. The proposal would allow prejudgment attachment of property of any agency or instrumentality as long as the agency or instrumentality has engaged in some commercial activity in the United States. The proposal contains several other conditions that attempt to balance the requirements of justice with the foreign policy concerns of the United States. The attached property must otherwise be subject to execution upon the entry of a final judgment. The purpose of the attachment must be only to secure the satisfaction of a possible judgment and not to obtain jurisdiction. The property of a private party must be subject to attachment in similar circumstances. The moving party must show a probability of success on the merits and a probability that the assets otherwise will be removed from the United States before a judgment is entered. Finally, the moving party must post a bond greater than 50 percent of the value of the property or any higher amount required by applicable law. These stringent conditions should ensure that this procedure is not abused.

*Execution of Judgments.* Under the FSIA, immunity questions arise both at the initial jurisdictional decision to adjudicate (section 1605) and at the execution stage of enforcing a judgment (sections 1609-1611). The present FSIA execution provisions have been criticized as unduly restrictive.<sup>34</sup> Under current law, only foreign state property "used for the commercial activity upon which the claim is based" may be levied upon. Also, there is no express provision for execution on a noncommercial tort judgment. Therefore, enforcement of noncommercial tort judgments is now limited to insurance proceeds under section 1610(a)(5). The Diplomatic Relations Act of 1977 requires foreign diplomatic personnel to obtain liability insurance for "risks arising from the operation in the United States of any motor vehicle, vessel, or aircraft."<sup>35</sup> Thus, claimants may not be able to enforce noncommercial tort judgments that do not relate to "the operation in the United States of any motor vehicle, vessel, or aircraft."<sup>36</sup>

Senator Mathias proposes to broaden the waiver of sovereign immunity for execution under section 1610(a)(2) to reach any governmental property "used or intended to be used for a commercial activity in the United States." Under this amendment, a claimant could execute a judgment against a foreign state or state agency on any of that foreign state's or state agency's commercial property, regardless of whether the property was involved in the cause of action. The claimant need only show that the property is "commercial in nature." This provision would also allow execution on such commercial property to enforce noncommercial tort judgments.

<sup>34</sup> See ABA report accompanying ABA proposals, *supra* note 3.

<sup>35</sup> 22 U.S.C. §254e (1982).

<sup>36</sup> See *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), summarized in 79 AJIL 447 (1985).

This broadening of the description of governmental property subject to levy under the FSIA, however, would still be limited to the property of the particular defendant government or governmental entity against which judgment was rendered. There would be no authorization to levy generally on the commercial property of governmental agencies to satisfy a judgment against a government or to levy on property of one agency to satisfy a judgment against another. The recent Supreme Court decision in *Bancec*<sup>37</sup> guides courts on those limited circumstances where it would be equitable to disregard corporate forms with respect to the separate rights and obligations of foreign governmental agencies.

The Mathias proposal also deletes the provision on execution relating to expropriated property, which appears in section 1610(a)(3). Apparently, the reason for this change is that the new broad provision on execution on commercial property in section 1610(a)(2) makes section 1610(a)(3) superfluous.

Finally, the amendment telescopes what was formerly section 1610(b) on execution against foreign governmental agency property into a new section 1610(a)(3), without changing the current substantive law on this point. Since the term "foreign state," to which section 1610(a) applies, also includes agencies or instrumentalities of foreign states, it appears logical to consolidate the provisions in the manner proposed.

*Admiralty Claims.* Senator Mathias also proposes a variety of provisions to protect and strengthen plaintiff's in personam rights in connection with governmental shipping. Under the FSIA, claims that are based on maritime liens against governmental shipping are the subject of special provisions.<sup>38</sup> The FSIA replaced the in rem action against the ship of a foreign state with a quasi in personam action. This procedure obviated the need to attach the foreign state vessel and was designed to reduce friction in U.S. foreign policy.<sup>39</sup> Unfortunately, this procedure has also led to several problems.

Under current law, if a party improperly arrests a foreign state vessel it can lose all in personam rights against the owner.<sup>40</sup> While Congress may have intended this result,<sup>41</sup> the proposal to replace this harsh sanction with a provision making the arresting party only liable in damages for the wrongful arrest seems reasonable.

Senator Mathias suggests clarifying that in section 1605(b) cases the suit shall "proceed and shall be heard and determined according to the

<sup>37</sup> First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983), summarized in 78 AJIL 230 (1984).

<sup>38</sup> 28 U.S.C. §1605(b) (1982). See generally Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 TUL. L. REV. 1274 (1983).

<sup>39</sup> See H.R. REP., *supra* note 11, at 21.

<sup>40</sup> See, e.g., *Jet Line Servs., Inc. v. M/V Marsa El Hariga*, 462 F.Supp. 1165 (D. Md. 1978).

<sup>41</sup> The House report indicates that if a claimant arrests or attaches a foreign state-owned vessel, the claimant "will lose his in personam remedy." H.R. REP., *supra* note 11, at 21.

principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained." This proposal should meet little opposition since it apparently was the original intention of Congress in 1976.

The final admiralty proposal provides that preferred mortgages on vessels may be foreclosed upon in rem, as maritime liens, in accordance with the Ship Mortgage Act of 1920.<sup>42</sup> Since the FSIA substituted an in personam remedy for the traditional in rem remedy and eliminated the arrest of vessels, it resulted in uncertainties in the enforcement of the liens of preferred mortgages on foreign state-owned vessels. This undermined the security of ship mortgages, diminished the value of vessels as security and impaired the mortgagees' priority status. It is important to both lenders and foreign borrowers that the vessel remain meaningful security for a preferred ship mortgage. The consensual nature of the preferred mortgage lien distinguishes it from other maritime liens and justifies special treatment under the Act.

*Loan Transactions.* A final proposal would explicitly provide in section 1603 that debt securities issued and guarantees thereof by foreign states constitute "commercial activity" not protected by sovereign immunity. This provision would make explicit in the FSIA statute what was clearly intended by Congress in 1976. The British State Immunity Act explicitly reaches the same result.<sup>43</sup> This proposal will help ensure that the United States does not suffer a disadvantage in the international banking community.

#### *Recent Decisions relevant to the Proposed Amendments*

Two recent court decisions are relevant to assessing the impact of the proposed amendments. In the first case, *Verlinden B.V. v. Central Bank of Nigeria*,<sup>44</sup> the U.S. Supreme Court reviewed the constitutional basis for the FSIA and enunciated guiding principles for its implementation in the lower federal courts. *Verlinden*, a Dutch corporation, sued the Nigerian Central Bank in a U.S. district court in New York for alleged anticipatory breach of a letter of credit supporting a cement supply contract. The district court concluded that Congress had intended to authorize foreign plaintiffs to sue foreign states under the FSIA and that this authorization did not exceed congressional power. However, it found that the defendant was immune under the Act and dismissed the complaint.<sup>45</sup>

The Court of Appeals for the Second Circuit affirmed the dismissal, but on different grounds. The court held that neither the diversity clause

<sup>42</sup> 46 U.S.C. §911 (1982). For background information on this point, see Yiannopoulos, *supra* note 38, at 1331-32.

<sup>43</sup> See §3(3) of British State Immunity Act, *supra* note 16.

<sup>44</sup> 461 U.S. 480, 103 S.Ct. 1962 (1983). See generally Recent Development Comment, 24 VA. J. INT'L L. 201 (1983).

<sup>45</sup> 488 F.Supp. 1284 (S.D.N.Y. 1980).

nor the "arising under" clause of Article III of the Constitution supported U.S. jurisdiction over actions by foreign plaintiffs against foreign sovereigns.<sup>46</sup>

The Supreme Court unanimously rejected this interpretation and reversed the court of appeals.<sup>47</sup> First, the Court confirmed that sovereign immunity is a matter of "grace and comity" and not a "restriction imposed by the Constitution."<sup>48</sup> The Court then found that the FSIA enacted a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities."<sup>49</sup> The Court concluded that the Act allows foreign plaintiffs to sue foreign sovereigns in U.S. courts and based the constitutionality of this grant of jurisdiction on Congress's power to provide for the jurisdiction of the federal courts.

The Court noted that *Osborn v. Bank of the United States*<sup>50</sup> is the "controlling decision" on the scope of Article III "arising under" jurisdiction. In *Osborn*, Chief Justice Marshall concluded that it is "a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction."<sup>51</sup> The *Verlinden* Court concluded that "a suit against a foreign state under this Act necessarily raises questions of substantive federal law."<sup>52</sup> Relying on *Osborn*, the Court held that Congress had constitutional authority for the FSIA grant of jurisdiction, including the grant to foreign plaintiffs suing foreign sovereigns in U.S. courts.

The *Verlinden* decision is important to the proposed amendments in several respects. First, the decision places the FSIA on firm constitutional ground and recognizes broad congressional power to legislate in this area. This assures Senator Mathias and other congressional supporters of the FSIA amendments that, while these amendments will not be immune from judicial review, courts will give great deference to congressional judgments on issues in the foreign sovereign immunity area.

The actual holding of *Verlinden*, which permits foreign plaintiffs to sue foreign sovereigns in U.S. courts, may open the way to important future litigation by foreign parties against foreign sovereigns. Many aliens and foreign corporations may have their only effective opportunity to present claims against foreign sovereigns under the FSIA in U.S. courts, either because of legal barriers (such as sovereign immunity) in foreign courts or a lack of assets that may be levied upon. The advantages that will accrue to U.S. claimants under the proposed amendments will also inure to the benefit of foreign plaintiffs, many of which are likely to be U.S.-owned foreign corporations. However, foreign plaintiffs must still show constitutional "minimum contacts" between their claims and U.S. courts and meet

<sup>46</sup> 647 F.2d 320 (2d Cir.), *rev'd*, 103 S.Ct. 1962 (1983).

<sup>47</sup> *Verlinden*, 103 S.Ct. 1962 (1983).

<sup>48</sup> *Id.* at 1967.

<sup>49</sup> *Id.* at 1968.

<sup>50</sup> 22 U.S. (9 Wheat.) 738 (1824).

<sup>51</sup> *Id.* at 822.

<sup>52</sup> *Verlinden*, 103 S.Ct. at 1971.

the FSIA statutory requirements in order to assert jurisdiction over the foreign sovereign. The *forum non conveniens* doctrine<sup>53</sup> may also bar foreign claims.

The *Verlinden* decision also confirmed the statutory relationship between jurisdiction and removal of immunity. Some commentators<sup>54</sup> have argued that the "conflation" of jurisdiction and immunity in the FSIA has led to confusion about the proper role of a court when a foreign state fails to appear to assert its sovereign immunity since the House report on the Act states that "sovereign immunity is an affirmative defense that must be specially pleaded."<sup>55</sup> The *Verlinden* Court supported this statutory interdependence and concluded that "even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act."<sup>56</sup>

While the Supreme Court decision in *Verlinden* settled a number of questions about the FSIA, it did not address one area that has been the focus of an increasing volume of litigation under the Act. Under section 1605(a)(2), a state is not immune for its acts stemming from commercial activity outside the United States that cause a "direct effect in the United States." The definitions of "commercial activity" and "direct effect in the United States" have been the topic of much litigation and commentary.<sup>57</sup> A broad interpretation of section 1605(a)(2) will widen the impact of the proposed new act of state amendment and the amendments aimed at more flexible execution.

The trade relations of many countries with the United States involve governmental commercial-type acts with direct effects in the United States. A government's action to restrain automobile exports to the United States would probably be characterized as a sovereign rather than a commercial act.<sup>58</sup> However, government airline involvement in the fixing of transatlantic air passenger fares would probably be construed as commercial activity

<sup>53</sup> See Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 411-12 (1982); Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373 (1980).

<sup>54</sup> See McDougal, *The Foreign Sovereign Immunities Act of 1976: Some Suggested Amendments*, 1981 PRIVATE INVESTORS ABROAD 1; Smit, *The Foreign Sovereign Immunities Act of 1976: A Plea for Drastic Surgery*, 74 ASIL PROC. 49 (1980).

<sup>55</sup> H.R. REP., *supra* note 11, at 17.

<sup>56</sup> *Verlinden*, 103 S.Ct. at 1971 n.20.

<sup>57</sup> See Brower, Bistline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AJIL 200 (1979); Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L.J. 1009 (1979); Note, *Commercial Activity under the Foreign Sovereign Immunities Act of 1976: Toward a More Practical Definition*, 34 BAYLOR L. REV. 295 (1982); Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440 (1983); Note, *Establishing Jurisdiction under the Commercial Activities Exception to the Foreign Sovereign Immunities Act of 1976*, 18 HOUS. L. REV. 1003 (1982).

<sup>58</sup> The Japanese Government's actions to restrain steel and automobile exports to the United States are examples of sovereign action. The foreign sovereign compulsion defense would protect private exporters from antitrust liability in these cases. See Letter from W. Smith, U.S. Attorney General, to Y. Okawara, Ambassador of Japan to the United States, May 7, 1981 (copies available from the authors).

that would subject the foreign governmental agents involved to private treble damage actions under U.S. antitrust laws.<sup>59</sup> The fine distinction between the characterization of trade-related actions as commercial or sovereign in nature will be of even greater importance under the proposed amendments to the FSIA. In addition to the removal of the act of state defense in contract actions, foreign governments and agencies would face greater practical liability for their commercial actions since any of their commercial property in the United States could be levied upon.

The proposed amendments also enhance the importance of the breadth of the "direct effect" test in breach of contract cases. The question whether a breach of contract satisfies the "direct effect" test has resulted in varying decisions.<sup>60</sup> The early court decisions on this issue narrowly construed the "direct effect" provision.<sup>61</sup> Moreover, many of the courts involved consolidated the constitutional "minimum contacts" inquiry and the statutory "direct effect" query into a single test requiring some affirmative act inside the United States.<sup>62</sup> Such a test does not seem to be required by the due process clause and is inconsistent with the statute, which only requires an "effect," not an "act," in the United States. The Second Circuit's opinion in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*<sup>63</sup> untied the "FSIA's Gordian knot" and provided a new pattern for breach of contract actions against governmental entities under the FSIA.

*Texas Trading* involved one of the numerous claims arising from Nigeria's breach of dozens of cement contracts. The crucial issues in the case were whether the Nigerian acts, involving shipments of Spanish cement to Nigeria, had produced "direct effects in the United States" and whether "minimum contacts" existed. The court divided the first issue into two inquiries. Was there a "direct effect"? If so, was the direct effect "in the United States"? The court noted that "[a]pplying the [direct effect] term to a corporation" is not so simple "as applying it to a natural person."<sup>64</sup> Although the court did not attempt to define the parameters of direct financial loss, it did conclude that beneficiaries of contracts that are breached surely suffer a direct financial loss.

As to the "most difficult aspect" of the clause, the "in the United States" requirement, the court found that the test had been met for two reasons. First, the suppliers were to collect their money in the United

<sup>59</sup> See *Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984), summarized in 78 AJIL 666 (1984).

<sup>60</sup> The direct effects test seems to exclude actions by Americans against foreign governments and governmental agencies for their personal injury or death abroad. See *Harris v. VAO Intourist, Moscow*, 481 F.Supp. 1056 (E.D.N.Y. 1979); *Upton v. Empire of Iran*, 459 F.Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979).

<sup>61</sup> See, e.g., *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980); *Waukesha Engine Div. v. Banco Nacional de Fomento Cooperativo*, 485 F.Supp. 490 (E.D. Wis. 1980).

<sup>62</sup> See Note, *Effects Jurisdiction under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U.L. REV. 474 (1980).

<sup>63</sup> 647 F.2d 300 (2d Cir. 1981).

<sup>64</sup> *Id.* at 312.



States. Second, each of the plaintiffs was an American corporation. The court specifically reserved judgment on whether failure to pay a foreign corporation in the United States or an American corporation overseas would satisfy the statutory requirement. The court concluded that the key question is whether the effect is "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case."<sup>65</sup>

Turning to the "minimum contacts" issue, the court concluded that cases from *International Shoe*<sup>66</sup> to *Woodson*<sup>67</sup> require four separate inquiries to satisfy "minimum contacts":

[T]he court must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.<sup>68</sup>

The court concluded that the activities of the Central Bank of Nigeria could be attributed to the state itself for "minimum contacts" inquiries. From this conclusion, the court easily found the requisite contacts with the United States. The court relied upon acts occurring in and outside the United States to reach its conclusion. The court did not address the question whether minimum contacts could be established solely by actions taken outside the United States.

This case and the extended construction of direct effects that it relies on should lead to a broader reading of the "direct effect" language of the Act.<sup>69</sup> Since foreign states should no longer be able to rely on a narrow reading of "direct effect" to claim immunity under the Act in breach of contract cases, they may seek to rely on the act of state doctrine to avoid liability. Under the proposed amendments, however, foreign countries can no longer rely on the act of state doctrine in breach of contract cases. As a result, the broader reading of "direct effect" and the proposed act of state amendment should result in greater protection for U.S. nationals contracting with foreign states abroad.

### Conclusion

The proposed amendments should provide greater confidence to those who deal with sovereign states that sovereign immunity will not be raised unfairly to defeat commercial expectations. This confidence should result in an increased willingness by nonsovereign parties to deal with sovereign states in the commercial marketplace. Thus, the proposed amendments will benefit both nonsovereign parties and sovereign states. These amend-

<sup>65</sup> *Id.* at 313.

<sup>66</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>67</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

<sup>68</sup> 647 F.2d at 314.

<sup>69</sup> See, e.g., *Rio Grande Transp., Inc. v. M/V Ibn Batouta*, 516 F.Supp. 1155 (S.D.N.Y. 1981).

ments will also bring U.S. law closer to the practice of other nations. Since it is desirable to develop common international rules of sovereign immunity, this effect is a substantial reason to enact these proposals.

TIMOTHY B. ATKESON & STEPHEN D. RAMSEY\*

#### APPENDIX†

##### §1603. DEFINITIONS

For purposes of this chapter—

(a) A “foreign state,” except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The “United States” includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A “commercial activity carried on in the United States by a foreign state” means commercial activity carried on by such state and having substantial contact with the United States.

(f) A “commercial activity” includes any promise to pay made by a foreign state, any debt security issued by a foreign state, and any guarantee by a foreign state of a promise to pay made by another party.

##### §1605. GENERAL EXCEPTIONS TO THE JURISDICTIONAL IMMUNITY OF A FOREIGN STATE

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the

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† Sections of the FSIA unaffected by the proposed amendments have not been reproduced. Brackets indicate language in the current Act to be deleted in the amended version. The underlined portions represent language sought to be added.

waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; [or]

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) which is brought to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or which is brought to confirm, recognize or enforce an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, or (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or Section 1607.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; [but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice;] and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and,

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

[Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: Provided, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.]

(c) Whenever notice is delivered under subsection (b)(1) the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of suit and, where the decree is for money judgment, interest as ordered by the Court, provided that the Court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided by this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case brought to foreclose a preferred mortgage, as defined by the Ship Mortgage Act, 1920 (46 U.S.C. 911). Such action shall be brought and shall be heard and determined in accordance with the provisions of such Act, and the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

## §1606. EXTENT OF LIABILITY

(a) As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

(b) The Federal act of state doctrine shall not be applied on behalf of a foreign state with respect to any claim or counterclaim asserted pursuant to the provisions of this chapter which is based upon an expropriation or other taking of property, including contract rights, without the payment of prompt, adequate, and effective compensation or otherwise in violation of international law or which is based upon a breach of contract, nor shall such doctrine bar enforcement of an agreement to arbitrate or an arbitral award rendered against a foreign state.

## §1610. EXCEPTIONS TO THE IMMUNITY FROM ATTACHMENT OR EXECUTION

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter[, used for a commercial activity in the United States], shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State, or upon an arbitral award, after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is used or [was used for the commercial activity upon which the claim is based] intended to be used for a commercial activity in the United States, or

[(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or]

(3) the property belongs to an agency or instrumentality of a foreign state engaged in commercial activity in the United States and the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605 or 1607 of this chapter, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States.

[Provided, That such property is not used for purposes of main-

taining a diplomatic or consular mission or the residence of the chief of such mission, or]

[(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.]

This subsection shall not apply to property that is used for purposes of maintaining a diplomatic or consular mission or the residence of the chief of such mission, including a bank account unless that bank account is also used for commercial purposes unrelated to diplomatic or consular functions.

[(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.]

(b) [(c)] No attachment or execution referred to in subsection (a) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(c) [(d)] The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (b) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment or an arbitral award that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(d) (1) In addition to subsection (c), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment or injunctive relief prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior

to the expiration of the period of time provided in subsection (b) of this section, if—

(A) the property attached or enjoined would be subject to execution under this chapter with respect to that judgment,

(B) the purpose of the attachment or injunction is to secure satisfaction of a judgment or an arbitral award that has been or may ultimately be entered against the agency or instrumentality and not to obtain jurisdiction,

(C) the property of a private party would be subject to such attachment or injunctive relief in like circumstances,

(D) the moving party has shown:

(i) a probability of success on the merits, or has obtained judgment in favor of such party, and

(ii) a probability that the assets will be removed from the United States or disposed of by the agency or instrumentality before a judgment is entered or satisfied and that such action would frustrate execution of such judgment, and

(E) the moving party posts a bond in an amount equal to the greater of 50 percent of the value of the property attached or any higher amount required under applicable law.

(2) If the agency or instrumentality has not appeared to oppose an attachment or injunctive relief granted under this subsection, or if such agency has appeared but has not had an adequate opportunity to present an opposition, the court shall grant an immediate hearing to seek dissolution of the attachment or order, and the court shall dissolve the attachment or order if the agency or instrumentality—

(A) demonstrates that one or more of the applicable criteria in this subsection has not been satisfied, or

(B) posts a bond in the amount of the claim or the affected property, whichever is less.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in §1605(c).

## BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

*Ethiopia at Bay: A Personal Account of the Haile Selassie Years.* By John H. Spencer. Algonac, Mich.: Reference Publications, Inc., 1984. Pp. xiv, 397. Index. \$24.95.

This fascinating, moving and provocative book deals with John Spencer's career—extending from 1936 to 1974, with interruptions—in the service of the Government of Ethiopia. In part, it is a memoir, so that one is inclined to forgive the inclusion of detail and anecdotes that would be out of place in a treatise. Indeed, one welcomes much of such material, as adding interest and color and helping the reader to share, in some small measure, the appreciation of Ethiopian culture that inspired Spencer to become a devoted servant, and enabled him to become an effective servant, of the regime headed by Haile Selassie.

In the larger sense, however, the book is the story not of Spencer but of Ethiopia, its struggles and successes and failures in the period that began with its being conquered by Fascist Italy and ended with its becoming, as Spencer puts it, "a colony of the Soviet Union" (p. 353). This makes it, of course, a melancholy tale, tracing the evolution of the author's disillusionment and provoking the reader to ponder the plight of the small and weak state in the international arena. It thus becomes a highly useful study of important aspects of world affairs in the 20th century.

Spencer's career is a reminder of the fallacy of the assumption that the age of nationalism abolished the professions of mercenary soldier, diplomat and bureaucrat, reserving important governmental positions for persons presumably motivated mainly by national loyalty. Spencer was one of numerous foreigners serving the Ethiopian Government, and, if a census of persons now employed by governments other than their own were possible, it would undoubtedly yield an impressive total. A young lawyer with a freshly minted doctorate from Paris, Spencer was recruited as legal adviser to the Ethiopian Ministry of Foreign Affairs—specifically to help Ethiopia observe the laws of war so as to remain in a good position to protest violations by Italy. His functions were from the beginning far broader than his title suggested, and for many years he was in fact a prominent member of the small group of officials who conducted Ethiopia's foreign relations. The rudimentary character of that country's foreign affairs mechanism may be deduced from the fact that the reader might with some justice summarize Spencer's role as that of deputy foreign minister and chief typist. Despite the ingrained suspicion of each other and of foreigners that he attributes to the Ethiopians, they evidently



trusted Spencer and gave him weighty responsibilities. Their confidence was not misplaced. Although he sometimes describes Ethiopia as his client, he clearly became something more than a hired lawyer, honestly earning his pay. His commitment to the welfare and security of Ethiopia, his bias in Ethiopia's favor and against its enemies and betrayers, and his resentment of snubs and cavalier treatment accorded to Ethiopia and its leaders could hardly have been greater had he been a citizen of that state. He is critical of Ethiopian leaders, including the Emperor, but he is also, to a remarkable degree, self-critical, frequently chastising himself for having offered advice or taken action that he later recognized as not serving the interests of Ethiopia. One hopes that Third World governments are generally served as faithfully by foreign employees as Ethiopia was by Spencer.

Students of international law and organization will not uniformly share the author's despair, but they will be well advised to think soberly about the experiences that brought him to the conclusion that an adviser such as himself should consciously cast aside his legal training and, acting strictly as a diplomat and political strategist, undertake to be "the cynical guardian of his client's interests" (p. 354). Haile Sellassie took seriously and relied upon a number of things that Spencer, much more clearly than his employer, came to recognize as weak reeds. Mocking the law of war, the Fascist invaders subjected helpless Ethiopians to poison gas, and Spencer contends that prominent international lawyers, the International Committee of the Red Cross and the League of Nations deliberately turned a blind eye to these atrocities. The Emperor had relied upon the pretensions of the League as a collective security system. Spencer finds that the League did not simply act too feebly to stop Mussolini's invasion of Ethiopia, but acted faithlessly toward the victim; he convicts the League of having hidden behind the facade of ineffectual sanctions and of having actually supported Italy's campaign of conquest, of having betrayed rather than failed Ethiopia. He regards the UN Charter as a retrograde document, as compared with the League Covenant, with respect to its provisions for maintaining international law and order. Incidentally, he offers the curious argument that Article 37 of the Charter prevents a case of aggression from being considered by the Security Council unless both attacker and victim so agree. Starting with the valid point that unilateral submission of a complaint by the victim under Article 35 can only invite, not require, the Council's consideration, he somehow reaches the conclusion that Article 37 forbids submission of a case to the Council, and its inscription on the agenda, without the consent of the accused (see pp. 164, 365). I see no warrant for this interpretation either in the language of the Charter or in the practice of the Security Council. Moreover, I see no important distinction between requesting and commanding such a body as the Security Council to act, given the fact that a political organ reaches its decisions by the votes of delegates instructed by states; constitutions cannot effectively dictate motivations or criteria of judgment.

These quibbles aside, the author is indubitably correct in his conclusion that collective security is a dead issue and that reliable guarantees of a

state's security by other states, whether or not under the aegis of an international organization, are among the world's scarcest commodities. The litany of Spencer's discouragement about international law and organization may be ended by reference to his bitterness about the persistent refusal of virtually every statesman or other international figure with whom he did business to regard Ethiopia as in any sense a state entitled to equality of treatment with others—especially, of course, the great powers.

Ethiopia's struggles for political independence and territorial integrity, in both their successful and their unsuccessful phases, indicate the continuing significance of colonial ambitions and rivalries, whatever they may be called. Mussolini's regime was not the last to have colonialist designs upon Ethiopia. Spencer describes British policy regarding postliberation Ethiopia as that of establishing a virtual protectorate, and analyzes the postwar settlement of the Italian colonies issue as a contest among unrepentant colonialists (in which Italy was treated with greater respect than Ethiopia). He treats the Greater Somaliland project espoused first by Britain and then by Somalia as a serious threat to Ethiopia, and ends with the somber message that the Soviet ambition to acquire a colonial foothold in the region of the Horn of Africa came to fruition with the effective subjugation of Ethiopia after the revolution of the early 1970s. He notes that Western European colonialism, for all its cavalier behavior toward Ethiopia, formerly protected that country from Middle Eastern Islamic and Soviet colonialism. His analysis confirms the judgment that the concept of trusteeship, introduced into international law and organization with the noble objective of transforming colonial possession from a matter of exploiting privileges to a matter of exercising responsibilities, never really took root. Debates about disposition of the Italian colonies included the language of trusteeship but exuded the spirit of colonialism.

Finally, this book offers thoughtful and thought-provoking commentary about the record of the United States in the matters with which it deals. On the positive side, the United States played a role in diminishing Britain's dominance after Ethiopia was liberated from Italy in 1941, and later was quite generous with economic and military assistance. The author suggests, however, that American respect for the sensitivities and the interests of Ethiopia was not notable. What is more important, he pictures the United States as a disastrously inconstant and ultimately unreliable partner and patron. He sees the American involvement in Ethiopia as having been more provocative than protective; we contributed to getting the Ethiopians into trouble with their Moslem neighbors and with the Soviet Union, and then abandoned them to their fate. France, in his view, sold out Ethiopia in 1935, and the United States did so in 1974. The United States, so often accused of too rigid and militant an anti-Communist stance, is convicted by Spencer of having exhibited an unwillingness to defend its position in the strategically important area of the Horn when a Soviet challenge arose. Haile Sellassie's lifelong admiration for and reliance upon the United States was finally responsible, in the author's view, for

bringing him to an unknown grave on an unknown date—and for handing his country over to Soviet control.

One can almost sense the author's weeping at the end of this story. We should read it, perhaps without weeping, but certainly with sober thought.

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*A Methodology of International Law.* By Maarten Bos. Amsterdam, New York, Oxford: North-Holland, 1984. Pp. xxi, 357. Index. Dfl.180; \$69.25. Distributed in USA/Canada by Elsevier Science Publishing Co., Inc.

According to Dr. Maarten Bos (professor of international law at the University of Utrecht), he was drawn to writing this text on the "methodology of international law" because he believed that this "field of systematic inquiry" "might safely be called a neglected subject." At the outset, he observes that "international lawyers only exceptionally are theoreticians of the law" and that "legal theorists seldom are familiar with international law." He believes that his book will address the question of the binding force of international law—the "objectivity" of such law, and the extent to which it is a binding force "independent of the will of nations."

When the writings on this theme of such Western experts as Bos are compared with those of Professor Grigory Tunkin, a leading Soviet jurist, this issue can be seen in the larger policy context, in terms of its strategic significance for the shaping of global public order. Tunkin, in his writings, stresses the consensual element in customary international law, insisting that this element must be present, or such law is not "binding" on a state. He also stresses the overriding importance of treaties in establishing obligations, i.e., instruments clearly within the control of the bargaining processes of states. In his Hague lectures in 1958, for example, Tunkin observed:

If a customary norm of international law is produced by agreement between States and therefore is an expression of wills of the States, the sphere of validity of a customary norm is confined to relations of those States which recognized this norm as a norm of law, i.e., which are parties to a tacit agreement.

Because the question of "objectivity," according to Bos, goes to the essence in establishing the "authority of international law," his text on methodology is in large measure an examination of this question. But, while he sets out to examine customary international law, chapter 5, covering treaties, their interpretation and their application, is intended to apply the Bos methodology to treaties as well.

Here, Bos concludes that the language or the words of the treaty in their literal sense are paramount. However, in the application of the

The field of the international protection of human rights, steadily growing in importance, is dealt with in four pages only, as a subchapter of chapter X, "Population of a State." Information on the respective universal treaties is not updated—the last one mentioned is the 1973 International Convention on the Suppression of the Crime of *Apartheid*. Neither the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, nor a number of previous conventions are mentioned. A complete table with the titles of all these treaties is badly needed.

On page 112, the number of the members of the International Law Commission is still given as 25. The UN specialized agencies are briefly covered, but UNIDO is not mentioned at all, though its 1979 constitution was ratified in 1982, and it finally became the 16th member of the group on June 21, 1985.

Such criticism notwithstanding, Góralczyk's "Outline" seems to play a positive role in the teaching of international law in Poland.

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*Die Staatenimmunität im amerikanischen und englischen Recht.* By Ulrich von Schönfeld. Berlin: Duncker & Humblot, 1983. Pp. 180. DM 66.

The doctrine of state immunity has been the subject of many publications, especially during the last few years.<sup>1</sup> The book under review, a doctorate of law thesis, was accepted by the Law Faculty of the University of Bonn in 1982 and published as volume 28 in a German series of international law publications in 1983. Von Schönfeld's study is different from earlier publications to the extent that he does not characterize the changing customary rules of international law. The author concentrates on presenting and analyzing the Foreign Sovereign Immunities Act (FSIA) (1976) of the United States and the State Immunity Act (SIA) (1978) of Great Britain.

The volume consists of seven chapters, a bibliography and an appendix containing the complete text of the two Acts.

In the introductory chapter, the author presents a short survey of what he intends to cover and of general problems in regard to state immunity.

<sup>1</sup> See, e.g., Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AJIL 820 (1981); Gramlich, *Staatliche Immunität für Zentralbanken?*, 45 RABELSZ 545 (1981); Ress, *Entwicklungstendenzen der Immunität ausländischer Staaten*, 40 ZAÖRV 217 (1980); Reuter, *Einige Betrachtungen zur Natur der Staatenimmunität im Völkerrecht*, in Festschrift für Verosta 147 (1980); Seidl-Hohenveldern, *Neue Entwicklungen im Recht der Staatenimmunität*, in Festschrift für Beitzke 1081 (1979); Sinclair, *The Law of Sovereign Immunity. Recent Developments*, 167 RECUEIL DES COURS 115 (1980 II); Sucharitkul, *Immunities of Foreign States before National Authorities*, 149 id. 87 (1976 I); Schaumann & Habscheid, *Die Immunität ausländischer Staaten nach Völkerrecht und deutschem Zivilprozessrecht*, BERDGV 8 (1968); M. Malina, *Die völkerrechtliche Immunität ausländischer Staaten im zivilrechtlichen Erkenntnisverfahren* (Diss. Marburg 1978); Herndl, *Zur Problematik der Gerichtsbarkeit über fremde Staaten*, in Festschrift für Verdross 401 (1980); see also the author's bibliography.

After describing the general development from an absolute towards a restrictive approach, as illustrated by many judicial decisions of courts in the United States and Great Britain (ch. 2), von Schönfeld points out the general intentions and basic ideas of the British and American codification (ch. 3). Both Acts emphasize that state immunity is a general rule and not only an exception to the territorial state's right to full jurisdiction. This rule, however, does not have an absolute character. There are many detailed exceptions, especially as regards a state's commercial activities. The author also deals with some problems of a general character, like the relationship between the act of state doctrine and state immunity (pp. 44–46). Citing the Supreme Court decision in *Dunhill v. Cuba*<sup>2</sup> and the legislative history of the FSIA (p. 45), he underlines the fact that commercial acts of a foreign state must not be classified as acts of state because to do so would mean that absolute immunity had reentered through the back door. For this type of claim brought directly against a foreign state, the act of state doctrine must not be applied.<sup>3</sup>

The fourth paragraph of this chapter is devoted to the problem of which kind of state entity (e.g., departments of government, enterprises controlled by government) may invoke immunity. The American Act states in section 1603(b) that principally every agency or instrumentality and political subdivision of a foreign state is immune; the same applies for private enterprises owned by the state. In contrast, section 14(1) of the SIA grants immunity only to the departments of government (p. 54).

The next chapter deals with the provisions on immunity from jurisdiction (ch. 5, pp. 61–126). In this chapter, the largest as well as the most important one in the book, the conditions under which immunity applies are examined. Since state immunity is a privilege that may be waived either explicitly or by implication (sec. 1605(a)(1) of the FSIA), a state may also waive its immunity even in cases of *acta jure imperii* (p. 61). Section 1605(a)(2) contains the most important provision of the Act, stating that a foreign state is not immune if the action is based upon a commercial activity.

Although the British Act and the FSIA were drafted in a different style, the author finds that, in practice, both Acts cover the same scope of legal problems (p. 100). The two Acts are similar in their general approach, but there are different regulations on some details.

The sixth chapter treats immunity from execution and prejudgment attachment (pp. 127–44). In English law, execution measures may be taken if the property is in use or intended to be used for commercial purposes (sec. 13(4)). The author criticizes section 13(5), which allows the head of a diplomatic mission to declare any property as not intended for commercial purposes unless the contrary is proved. He also thinks that section 1610(a)(2) of the FSIA makes execution too difficult (p. 130). This

<sup>2</sup> *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

<sup>3</sup> See H.-E. FOLZ, *DIE GELTUNGSKRAFT FREMDER HOHEITSÄUSSERUNGEN. EINE UNTERSUCHUNG ÜBER DIE ANGLO-AMERIKANISCHE ACT OF STATE DOKTRIN* (1975).

rule provides that execution is only possible against the property that was used for the commercial activity upon which the claim was based.

It is a controversial question whether measures of execution may be taken against property with "mixed purposes" like an embassy bank account. This problem was not resolved by the two Acts. While the German Federal Constitutional Court granted immunity against execution to the Philippine Embassy's account,<sup>4</sup> the British Court of Appeal found that use of such an account had to be characterized as a commercial transaction because the "purpose of money in a bank account can never be 'to run an embassy'. It can only be to pay for goods and services. . . ." The latter decision, however, was reversed by the House of Lords,<sup>5</sup> which accords with the author's opinion (p. 140).

The absolute immunity of central banks, which is stipulated by both Acts, is another important and controversial problem. Von Schönfeld frankly dislikes this privilege, saying that economic interest won over justice (p. 142). In this context, it is interesting that the German Federal Constitutional Court recently decided that prejudgment attachment against a bank account of the National Iranian Oil Corporation was in accordance with public international law<sup>6</sup> even though the money was intended by Iranian law to be transferred to the National Bank of Iran. The Court said that this aspect did not change the private character of the account and that an extensive line of national legislation (United States, Great Britain and other countries) was not the result of an international law obligation but of purely political considerations.<sup>7</sup>

In a short conclusion (ch. 7, pp. 145-46), the author states that both codifications should not be classified as "bicentennial accomplishments" (p. 145) but as remarkable progress in the right direction, in spite of many detailed provisions that should be amended. As a whole, the British Act is characterized as slightly better than the American one.

This book was written with great care and competence. The author's method was to deal with the different problems and to compare the solutions provided by the two Acts. It is thus not a section-by-section commentary, but a well-documented comparative study. The volume should also contain at least a short statement about state immunity as a matter of *international law*. The reviewer's impression is that the author avoids expressing his own opinion about some closely connected international legal aspects such as the problem of whether state immunity is a rule or an exception to another rule. Although it is surely correct for a study to concentrate on national legislation, state immunity, being a traditional matter of international customary law, cannot be regarded as

<sup>4</sup> 46 BVerfGE 342 (1978).

<sup>5</sup> *Alcom Ltd. v. Republic of Colombia*, [1984] 1 All E.R. 1, *rev'd*, [1984] 2 W.L.R. 750 (H.L.).

<sup>6</sup> 64 BVerfGE 1 (1983); *see also* the Comments on this decision by Seidl-Hohenveldern, 1983 RECHT DER INTERNATIONALEN WIRTSCHAFT 613; and by Stein, 1984 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 179.

<sup>7</sup> 64 BVerfGE at 37.

a purely national legal problem. There is a reason for this close connection and interdependence since the customary rules of state immunity have almost all been formulated and influenced by the decisions of national courts and, last but not least, by legislation in the United States and Great Britain as well as (more recently) in Canada, Pakistan, South Africa and Singapore.

At the end of the book, however, the author discusses the attempts for an immunity convention made by the ILA and the ILC (without any references). The ILA Montreal Draft Convention of 1982<sup>8</sup> was published shortly after the book was finished, but the author should have been able to give at least a short commentary on the earlier ILC work,<sup>9</sup> which—like the ILA draft—adopts a more restrictive approach.

In sum, the book may be disappointing to those who expect some remarks about international law developments, but it is an excellent and clearly written comparative law study of the American and British immunity Acts.

HANS-ERNST FOLZ

*The Vienna Convention on the Law of Treaties* (2d ed.). By Ian Sinclair. Manchester and Dover, N.H.: Manchester University Press, 1984. Pp. x, 270. Index. £29.50; \$40.

The first edition of this book soon became a classic on the law of treaties after its publication in 1973.<sup>1</sup> The second edition comes at a most appropriate time because the Convention entered into force on January 27, 1980 and the first edition has been out of print for the last few years. This revised version goes well beyond a mere updating. As a matter of fact, the second edition is roughly twice the size of the first one. The general framework has not been changed. However, three new chapters have been added and all the other chapters have been considerably enlarged.

An entire chapter is now devoted to reservations (pp. 51–82). The practical importance of reservations to multilateral conventions as well as the new developments in the *corpus juris* of the field explains such an approach. The author concisely reviews the history of the regime of reservations from the traditional unanimity rule governing their admissibility to the developments at the Vienna conference. He addresses the reservations to the Convention itself and focuses especially on the recent jurisprudence on reservations as laid down by the court of arbitration in the *Anglo-French Continental Shelf* case (1977). Sinclair accurately shows

<sup>8</sup> Res. 6, INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTIETH CONFERENCE HELD AT MONTREAL 5 (1982).

<sup>9</sup> S. Sucharitkul, Special Rapporteur, Third Report on Jurisdictional Immunities of States and Their Property, UN Doc. A/CN.4/340 (1981).

<sup>1</sup> The first edition was reviewed by Herbert W. Briggs at 68 AJIL 351–52 (1974).

that the Vienna Convention has left open a whole array of questions such as the distinctions between reservations and interpretative declarations and between permissible and impermissible reservations.

A second substantial addition is the new chapter on interpretation of treaties (pp. 114-58), a topic that has given rise to extensive doctrinal dispute in international law, which can be summarized by stating the three possible doctrinal approaches to the problem: subjective or "intention of the parties"; objective or "textual"; theological or "object and purpose." The author analyzes the Convention rules and applies them to the most recent case law, e.g., the International Court of Justice in the Advisory Opinion given on December 20, 1980 concerning the *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*; the European Court of Human Rights in the cases of *Golder*, *National Union of Belgium Police*, *Campbell* and *Cosans*; and the Arbitral Commission on Property Rights and Interests in Germany. Sinclair also gives interesting insights into the practice of the courts of the United Kingdom, especially as far as recourse to the *travaux préparatoires* of a treaty is concerned.

Finally, a third new chapter addresses the significance of the Convention (pp. 242-60), some 14 years after its adoption, in the light of subsequent experience. Sinclair expresses the view that the Convention has established itself as the cornerstone of the modern law of treaties. To that extent, legal advisers to foreign ministries and to international organizations will, nowadays, turn initially to the Convention for guidance. However, he accurately points out that the guidance may not always be decisive, given the generality of the rules incorporated into the Convention and the fact that its scope is so limited (p. 250). On the whole, the relationship between the Vienna Convention and customary law will continue to be a subtle and complex one.

All the other chapters have been substantially expanded. In particular, the thorny question of the relationship between treaty and custom is thoroughly discussed at pages 22-24 and pages 252-58. It must be noted that a whole chapter addresses the concept of *jus cogens*, especially in relation to the settlement of those disputes that the Vienna Convention attached to that notion (pp. 203-41). On the concept of *jus cogens*, Sinclair supports some views that are meaningful with respect to the draft articles of the International Law Commission on state responsibility. In particular, the author rightly emphasizes that "[i]n the final analysis, it is the *content* of the rules which will be decisive in the determination of whether or not they have the attributes of *jus cogens*" (p. 216). Sinclair maintains the view that *jus cogens* is neither Dr. Jekyll nor Mr. Hyde, but that it has the potentialities of both. However, with respect to the scarcity of instances in state practice where the validity of a treaty has been seriously challenged on the ground that it conflicted with a rule of *jus cogens*, the author wryly notes that "it has some of the attributes of the Cheshire Cat which had the disconcerting habit of vanishing and then reappearing to deliver further words of wisdom" (p. 224).



Sinclair has mastered the humanities as well as treaty law. His frequent and well-chosen references to literature or art in order to portray certain distinctive features of the problems dealt with enlighten his analysis and give life to a piece of work that, for advanced scholars as well as for beginners, is doubtless one of the major treatises on the law of treaties. It is difficult to conceive how any serious analysis of any legal problem related to treaty law could start without consideration of Sinclair's study.

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*The Security Council and the Arab-Israeli Conflict.* By István S. Pogany. New York: St. Martin's Press, 1984. Pp. 225. Index. \$27.50.

The theme of this work—what lessons can be gleaned about the UN Security Council's capacity to effect peaceful resolution of disputes—is certainly prescient: and the canvas—the Security Council's handling of the Arab-Israeli conflict from 1948 on—provides a more than adequate frame of reference. But the subject's complexity proves too unwieldy for this slim volume which, on balance, makes for slight reading.

The work is divided into eight chapters. Chapter 1, "The Security Council and the United Nations Legal Regime for the Maintenance of World Peace and Security," is little more than a recitation of the basics about the UN Security Council's procedural mechanisms and powers under the UN Charter. Chapter 2, "The Genesis of the Arab-Israeli Conflict," attempts to present in less than seven pages a description of the conflict's origins (all with rather meager documentation). In Chapter 3, "The Security Council and the First Arab-Israeli War," the author concludes that the Arabs' attack on Israel in 1948 was not justified under international law. In Chapter 4, he reaches a similar conclusion in regard to the 1956 Israeli-Anglo-French intervention in the Suez. In Chapter 5, "The Security Council and the Six Day War," Pogany says that the Arab resort to war in 1967 was permissible but, in a new twist, expresses doubts about "proportionality" in Israel's taking of the Old City of Jerusalem and the Golan Heights. Pogany describes Security Council Resolution 242 of November 22, 1967 as "a unique, if imperfect, enunciation of the basic principles which must ultimately govern any settlement of the conflict," although conceding that it was left purposely ambiguous on the key question: whether Israel is enjoined to withdraw from all of the territories occupied in June 1967. For some reason, he characterizes this question as "of less than compelling interest as Resolution 242 was adopted in accordance with Chapter VI of the Charter [and] accordingly does not impose binding obligations on the combatants." This, as if it were of some measurable political significance.

In Chapter 6, "The Security Council and the Yom Kippur War," Pogany discusses as unlawful the resort to war by the Arab states in 1973,

as well as their use of the economic boycott. But his analysis of Security Council Resolution 338 of October 22, 1973, which decided that "immediately and concurrently with the cease-fire, negotiations start between the parties concerned under appropriate auspices," is much too cursory. Pogany notes, in passing, that it was achieved not at the United Nations, but primarily through Secretary of State Kissinger's negotiations in Moscow. It might have been useful to examine here what institutional mechanisms augur for or against an effective Security Council role in forging blueprints for the peaceful resolution of conflict.

Chapter 7, "The Security Council and Operation 'Peace for Galilee,'" is disappointing. Pogany describes the very important Franco-Egyptian initiative of July 1982 as calling for the recognition of the "legitimate national rights of the Palestinian people." It did that, but it also called for more—mutual recognition by Israel and the PLO, and recognition of the rights of the Palestinians to "self-determination in all of its aspects"; thus going beyond the terms of Security Council Resolution 242 and the Camp David Accords—a point Pogany does not mention—and leading to the threat of a U.S. veto.

Pogany concludes (ch. 8) that in all of these crises the Security Council, though not fulfilling the expectations of the drafters of the Charter, nevertheless "made a significant contribution to the preservation of world order": it helped "manage" the crisis, introduced peacekeeping forces and "elaborated principles to govern the resolution of conflict." That may be true, but the author hardly proves his case.

ALLAN GERSON

*U.S. Mission to the United Nations*

*The Quest for a Just World Order.* By Samuel S. Kim. Boulder: Westview Press, 1984. Pp. xix, 440. Index. \$38.50, cloth; \$15.95, paper.

This book deals with the broad subject of international relations and not, strictly speaking, with international law. Together with other scholars, lawyers and social scientists, the author has already published a number of volumes expounding the same themes.<sup>1</sup> Indeed, this book is one of the many publications written under the auspices of the Center of International Studies of Princeton University—a product of multidisciplinary and joint efforts—and the World Order Models Project (WOMP), which became the Institute for World Order (now renamed the World Policy Institute).

The author is not satisfied with describing world politics. Instead, he aims at interpreting world events, historical and contemporary, by reference to his grand theory of world order. His intention of formulating a mega-

<sup>1</sup> See, e.g., TOWARD A JUST WORLD ORDER (R. Falk, S. Kim & S. Mendlovitz eds. 1982); R. FALK & S. KIM, WOMP WORKING PAPER NO. 22, AN APPROACH TO WORLD ORDER STUDIES AND THE WORLD SYSTEM (1982); 4 THE STRATEGY OF WORLD ORDER (R. Falk & S. Mendlovitz eds. 1966).

theory is made explicit on page 79: "this approach requires (1) a diagnostic/prognostic task of describing present world order conditions and trends, (2) a modelling task of designing preferred futures, and (3) a prescriptive task of mapping transition strategies." He sets out to present the recipe for a global utopia!

As a lawyer, I have the following criticisms. The author's propensity to use polysyllabic jargon renders the book difficult to decipher and understand. Examples abound: "empirical reality," "normative reality," "eschatological escapism," "planetary consciousness-raising," "cacophonous symphony." Many rather meaningless platitudes are used, e.g., What does the author mean when he writes that "despite more than three decades of feverish 'theoretical' activities, international studies still cannot claim any major theoretical breakthroughs" (p. 57)? Does the author imply that his book furnishes such a breakthrough? Many sages, ranging from Machiavelli to Martin Luther King, Joseph Stalin to Richard Rosecrance, are indiscriminately cited and one wonders whether it is done for the sake of name dropping. With all due respect, I believe that the author does not make his arguments more cogent or attractive by referring to innumerable irrelevant antecedents and authorities. A wide spectrum of seemingly unconnected topics is discussed: human rights, environmental pollution, global inequities, world politics, global violence and many others. One wonders whether the author's mega-theory, which is not easily discernible at all, is so all-encompassing as to be capable of generating an explanation for each and every phenomenon experienced by or problem confronting humanity! Assessing the tenability of the author's assertions is, unfortunately, made more difficult by his rather convoluted writing style. It cannot be denied that the notes and the bibliography contain a massive amount of information. Nevertheless, they do not seem to bolster the author's credibility as a whole.

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*Epochen der Völkerrechtsgeschichte.* By Wilhelm G. Grewe. Baden-Baden: Nomos Verlagsgesellschaft, 1984. Pp. 897. Indexes. DM 138.

To Wilhelm Grewe we owe a great new history of international legal relations: *Epochs of the History of International Law*.

Grewe wants to describe "epochs," not "the epochs" of the law of nations. When he first conceived this work 40 years ago, at a time of supreme crisis in international law, he intended to trace the historical development of current principles. He then realized that a true "History of International Law" would require a broader examination, particularly of the international legal order of antiquity and of the Middle Ages. He does well by beginning his book with an outline of the legal order of the Middle Ages: "If one lays stress upon the point of time in which important institutions of modern international law emerged for the first time, one

has to seek the beginnings of European international law in the later Middle Ages," said the Frankfurt legal historian Wolfgang Preiser.<sup>1</sup> An international legal order which brought together the different existing institutions into a system came into being only in the late Middle Ages.

The modern history of the law of nations, according to the author, began at the time of the French invasion of Italy under Charles VIII of France in 1494; since then, there has been a modern system of states constituting the basis of modern international law. Grewe divides the succeeding periods according to the power that created the respective legal order: a Spanish age (1494-1648), a French age (1648-1815) and a British age (1815-1919). These periods are followed by the interwar years and the Second World War as the time of Anglo-American world hegemony (1919-1944), and finally by the "age of the American-Russian rivalry and the rise of the Third World" (since 1945). "The epochs of the modern history of international law and those of the modern system of states coincide; this is the simple, in the opinion of some people possibly banal, thesis of this book" (p. 25).

In the author's mind, the year 1919 constitutes an especially marked caesura: the world war ended the period of the "classical" law of nations which had existed since the 15th century. This division into periods was first set out by Grewe in an essay of 1942-1943<sup>2</sup> and has met with general approval in international law historiography. For each period, Grewe asks several "test questions" in order to fix the coordinates of the respective legal system.

First of all, he inquires into the spiritual foundations of the respective community of nations, its composition and spatial extension. Is this community occidental Christendom, the circle of "civilized nations," or, as the author believes, since 1945, a "universal legal community without a system of values"? How independent are the subjects of international law? What requirements have to be fulfilled to be recognized as a new member of legal society, requirements that the United States, for example, had to fulfill in the "French age"? How does international law grow and to whom does it apply? Who is able to force observance of this law? The answers to these questions inform us about the stage of development of international law.

Furthermore, Grewe examines the various legal forms of the distribution and government of the earth's surface and the important changes in the legal order of the seas. At the beginning of each main chapter, the reader finds a summary of the political history of the period.

In the historiography of modern international law, doctrine has often been pushed one-sidedly to the fore. As a man who worked for more than 25 years in the diplomatic service of his country, Grewe does not make

<sup>1</sup> W. PREISER, *DIE VÖLKERRECHTSGESCHICHTE. IHRE AUFGABEN UND IHRE METHODE* 31, 61-62 (1963).

<sup>2</sup> Grewe, *Die Epochen der modernen Völkerrechtsgeschichte*, 103 *ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT* 38-66, 260-94 (1943).

this mistake. He investigates how the theory and practice of states have influenced each other; he does not underestimate the importance of doctrine but, together with Ulrich Scheuner, he believes that the decisive steps towards a new international order "are left up to the decision and action of states." The former ambassador is capable of presenting the modern age's epochs of international law in their peculiarity and dependence on politics. He shows the interrelationship of "Geist, Baugesetze und Werden der völkerrechtlichen Ordnung."<sup>3</sup> The book provides a highly vivid picture of international life in the last five hundred years. Grewe's work is the first large-scale history of the law of nations to have appeared in the German language for a long time: the last comparable book was that of Wegner, published in 1936,<sup>4</sup> followed by the unfinished work of Stadtmüller (1951),<sup>5</sup> Reibstein's *History of the Ideas of International Law* (1958 and 1963)<sup>6</sup> and the German translation of Nussbaum's *A Concise History of the Law of Nations* (1960).<sup>7</sup> Looking at the present international legal order and quoting Emile Giraud, the author skeptically concludes: "L'évolution du droit international est commandée par celle de la politique internationale. Celle-ci traverse aujourd'hui une phase très critique et le droit international ne peut qu'en souffrir."<sup>8</sup> Grewe hopes to have contributed "some stones" to the building of a future history of international law—if he were British, one would speak of typical understatement.

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*Friedensdokumente aus fünf Jahrhunderten: Abrüstung, Kriegsverhütung, Rüstungskontrolle.* 2 vols. Edited by Jost Delbrück. Published under the auspices of the Institute for International Law of the University of Kiel. Kehl, Strasbourg, Arlington: N. P. Engel Verlag, 1984. Pp. 1625.

In October 1984, Congress created a new institution—the United States Institute of Peace—to be devoted to international peace research, education and training. A Canadian Institute for International Peace and Security was also formed in 1984. The European community has a much longer history of trying to determine the causes of and cures for world conflict. Professor Delbrück, who is the director of the Kiel Institute, has joined with seven colleagues to offer serious students of peace an outstand-

<sup>3</sup> "Spirit, organic laws and growth of the international legal order."

<sup>4</sup> A. WEGNER, *GESCHICHTE DES VÖLKERRECHTS. HANDBUCH DES VÖLKERRECHTS* (1936).

<sup>5</sup> G. STADTMÜLLER, *GESCHICHTE DES VÖLKERRECHTS* (1951).

<sup>6</sup> E. REIBSTEIN, *VÖLKERRECHT. EINE GESCHICHTE SEINER IDEEN IN LEHRE UND PRAXIS* (vol. I, 1958; vol. II, 1963).

<sup>7</sup> A. NUSSBAUM, *GESCHICHTE DES VÖLKERRECHTS IN GEDRÄNGTER DARSTELLUNG* (1960).

<sup>8</sup> "The development of international law depends on the development of international politics. Today the latter is in a highly critical phase, a fact from which international law is bound to suffer."

ing collection of documents tracing humanity's disarmament, war prevention and arms control efforts during the past five centuries. It is a model of clarity and good organization; readers can only regret that it was not printed in English.

The collection is divided into a dozen topics, each of which receives a comprehensive commentary and analysis, followed by a brief bibliography and extracts from treaties and accords tracing the history of that subject. A chronological and topical index makes for ready reference to the 769 documents. In his lengthy introduction, Delbrück makes clear that his coauthors have sought to avoid fruitless confrontation between pacifistic euphoria and so-called political realism. He recalls the ancient Roman dictum: "If you would have peace, prepare for war," but he notes the risks and costs of that doctrine of deterrence. His study of the record leads him to conclude that "even in ancient times of conventional weaponry, an uncontrolled arms race was never able to guarantee peace" (p. 33).

Professor Karl-Ulrich Meyn, of the University of Osnabrück, opens the study with a chapter on "Prohibitions against War and the Use of Force"—a relatively recent restriction in the evolution of international law. He notes that as long as there is no effective system of collective security backed by an international force (which he regards as a utopian conception), the only effective way to restrict the use of force is through arms limitations. Detlev Schuster, of the Kiel Institute, concentrates his chapter on the efforts to reach general and complete disarmament. He describes the arms control proposals before the First World War and traces the development through the Covenant of the League, the UN Charter, the Baruch Plan and the aborted McCloy-Zorin Agreement of 1961. He feels that the complexity of the subject and the unwillingness of states to accept the necessary constraints doomed the disarmament efforts to failure. Professor Elbe H. Riedel, of the University of Mainz, deals with the limitation of conventional weapons and forces, while Hans-Joachim Schütz, of the Military Academy in Hamburg, writes about the efforts to limit naval warfare. Klaus Wiegel of Hamburg, who, like Delbrück and Riedel, studied law at the University of Indiana, directs his gaze at the control of nuclear weaponry, nonproliferation and the establishment of nuclear-free zones. Riedel ends volume 1 with a chapter on the strategic arms limitation agreements.

Volume 2 opens with another chapter by Schütz, dealing with bacteriological and chemical warfare and similar weapons of mass destruction. Reinhard Hermes of the Law of the Sea Institute in Hamburg writes about demilitarization and his chapter is complemented by Meyn's section on neutrality. Hans Kausch, of Bonn, comments on international arms transfers and concludes that controls are "urgently necessary" (p. 1167). Schütz returns again to write about confidence-building measures. He argues that although they are dependent upon the political climate, they represent more than just a feeling toward an adversary; they provide exchanges of information that increasingly eliminate some of the uncertainty, suspicion and hostility that generate fear and war. The most

difficult stumbling block to disarmament—verification—is dealt with by Delbrück in the last chapter. He quotes the adage: "Confidence is good but controls are better" (p. 1328), but he warns against a perfectionist approach that can defeat desired goals. He notes the modern techniques for monitoring anything that happens on this planet. The documents also describe many procedures and systems contained in many arms control agreements to assure compliance or to resolve differences of interpretation without conflict.

The authors are mindful of the fact that enduring peace requires much more than arms control. They have deliberately avoided such contentious issues as the clarification of international norms, economic justice or the problems of enforcement, in order to concentrate on solutions that may be closer to the human grasp. Their study provides a rich mine of information to enable the reader to judge the merit of such proposals as President Reagan's "Strategic Defense Initiative" ("Star Wars") and whether it violates the Anti-ballistic Missile Systems Treaty or the trend of previous disarmament concepts. In all, they are to be complimented for assembling key documents relating to the most important problem of our time—peace. The two volumes will prove a useful tool to all students of that subject who command the German language.

BENJAMIN B. FERENCZ  
*Of the New York Bar*

*The USSR, Eastern Europe and the Development of the Law of the Sea.* Compiled, translated and edited by William E. Butler. London, Rome, New York: Oceana Publications, Inc., 1983. \$100/binder.

*The Citizenship Law of the USSR.* By George Ginsburgs. The Hague, Boston, Lancaster: Martinus Nijhoff Publishers, 1983. Pp. xii, 394. Index. Dfl.200; £50.

Soviet legislation proliferated under Brezhnev and Andropov, partly as a corollary of international obligations assumed by the USSR. These two volumes indicate what has been done to update old statutes in two prominent fields, namely, the law of the sea and the rights of citizens.

William E. Butler, evidencing his continuing concern for English translations of Soviet laws, provides yet another volume in his expanding loose-leaf series devoted to Soviet legislation. He gathers together every scrap on water law and the sea frontiers of the USSR (notably, the law of November 24, 1982, but also including prior legislation on the continental shelf, the exclusive economic zone and even the Fundamental Principles of Water Legislation (1970) and the pioneering claim of 1926 to jurisdiction over Arctic land within a "sector"). Except for notes on legislative history, Butler provides no commentary. For the older statutes he has already done so in his studies on Soviet territorial waters, the law of the sea and the Northeast Arctic Passage.

George Ginsburgs, in contrast, provides no texts, but rather an in-depth analysis of the 1978 law on USSR citizenship, just as he did in 1968 in a volume devoted to analysis of the preceding citizenship law. With his characteristic concern for detail, he leaves, seemingly, no stone unturned, unless it is the problem raised for American-born children of parents who, on emigrating from the Baltic states as they were being absorbed by the USSR, did not seek release from a citizenship that Soviet law proclaimed to be that of the USSR. Because Soviet law incorporates the principle of *jus sanguinis*, and recognizes no dual citizenship, the status of offspring of such parents is not entirely clear and some hesitate to visit their parents' roots without clarification.

For readers of this *Journal*, Ginsburgs's comparison of the new law with international obligations assumed by the USSR in international agreements will have paramount interest. Ginsburgs concludes that the new law does not correspond in full with obligations assumed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Nationality of Married Women, the Convention on the Reduction of Statelessness and the Helsinki Final Act.

The deficiency in the human rights cases is that the individual is given no right to assert his citizenship versus the will of the state. Bureaucrats rule supreme, with no appeal to an independent organ, although both human rights documents assert such a right. With illustrations from practice, Ginsburgs makes the case that the state, i.e., the bureaucracy, retains the exclusive prerogative in violation of Article 15 of the Universal Declaration and Article 12 of the Covenant. As to the Nationality of Married Women Convention, Ginsburgs finds violation of Article 3, paragraph 1, because Soviet law provides no "specially privileged naturalization procedures" for foreign wives of Soviet citizens. The Statelessness Convention is flouted by Soviet practice because no attention is given to the recommendation that individuals be allowed to retain their Soviet nationality while seeking to acquire another one. The intention of the Helsinki Final Act to speed emigration is thwarted by long waits for exit visas and the requirement that no visa will be granted to Jewish applicants unless they accept denationalization.

Ginsburgs raises an interesting point on the right of appeal. Without doubt, opportunities to challenge arbitrary decisions of bureaucrats are few in Soviet law, although Soviet jurists are currently urging formulation of appropriate procedures to permit such challenges. If they succeed in bringing courts into the procedure, Westerners may ask whether it can be meaningful in a system that recognizes no separation of powers. Some Western states with no separation concept have created a tradition through practice of judicial review. Ginsburgs, in an otherwise rather gloomy analysis of Soviet law, provides a surprise. He seems to think it possible that with further strengthening of the legal community in the USSR, "decisions may be prompted by a legal rationale instead of mere political convenience" (p. 28).

JOHN N. HAZARD  
*Board of Editors*



*The Lawfulness of Deep Seabed Mining*. 3 vols. Vols. I and II (1980) by Theodore G. Kronmiller. Vol. III (1981) by Theodore G. Kronmiller and G. Wayne Smith. London, Rome, New York: Oceana Publications, Inc. Vol. I: pp. xix, 521; vol. II: pp. iii, 460. Index. Vol. III: pp. xi, 556. \$40/vol.

Four or five years have passed since the publication of these volumes, but the debate to which they contribute "concerning the permissibility of deep ocean mining under [customary] international law" has become even more lively than in 1980. The closing date for signature of the Law of the Sea Convention has passed, attracting 159 signatures, but not those of certain states with unilateral seabed mining legislation, the United States, the United Kingdom and the Federal Republic of Germany; meanwhile, 1988 approaches, the year when that legislation purports to permit the commencement of commercial exploitation.

The book, or at least the first volume, is worth purchasing, whatever its merits, because reliance was placed upon it in framing certain provisions of the U.S. legislation. It is also useful to those interested in the statute's legislative history. Volume III consists of documents pertaining to that history, with the addition of an interesting collection of letters and official statements of the 1979-1980 period.

Of course, none of the volumes cover subsequent developments in U.S. policy and at UNCLOS III under the Reagan administration, but volume II alone seriously suffers from this. Apart from tables of cases and treaties, an extensive bibliography and an index to volume I, it consists of nine appendixes. Each of these is of historical interest, especially those containing U.S. and West German draft legislation, but appendixes I-III and IX are of little present interest. It would have been appropriate to include the early applications of Deepsea Ventures, Inc.<sup>1</sup> and, perhaps, Kennecott Corporation.<sup>2</sup> Kronmiller's 521-page argument in volume I still appears to represent his views.<sup>3</sup> This is not surprising because, to a very large degree, his authorities predate UNCLOS III and, indeed, the 1960s, when interest in deep seabed mining first became serious. This is a major flaw in the work.

Unfortunately, Kronmiller's work is based on several assumptions that subsequent developments have proved incorrect, viz., that mining would commence during the 1980s and that there would be many sites and few overlapping claims.<sup>4</sup> Kronmiller argues that the seabed is, on the balance of authority, *res nullius*, so that mine sites are capable of exclusive appropriation, but that, even if the alternative *res communis* theory holds,

<sup>1</sup> Notice of Discovery and Claim of Exclusive Mining Rights, etc., reproduced in 14 ILM 51 (1975).

<sup>2</sup> Application of Aug. 21, 1970. See application under Pub. L. No. 96-283, Feb. 16, 1982, at 1-2.

<sup>3</sup> See, e.g., his Statement before the National Advisory Committee on Oceans and Atmosphere, Oct. 17, 1983.

<sup>4</sup> Experience with the Final and Supplementary Agreements of the mining consortia has disproved this: Broadus & Hoagland, *Conflict Resolution in the Assignment of Area Entitlements for Seabed Mining*, 21 SAN DIEGO L.R. 541, 554 (1984).

seabed mining (but not the exclusive use of a mine site) is legal under the freedoms of the high seas; the problem with this view is the absence of any security of tenure against foreign nationals.

Volume I has five chapters and a conclusion. The author adopts a logical progression from an introduction on the political/economic aspects to discussion of the juridical status of the seabed and subsoil, to that of the effects of developments at the United Nations, to an examination of mining as a possible high seas freedom and, finally, to a discussion of mining as a use analogous to existing freedoms.

Chapter 1 illustrates the exhaustiveness of research into the (older) authorities displayed throughout the volume. Some of the accounts are impressively comprehensive. It is in chapter 2, however, that the author first shows a tendency, after presenting a balanced account of juristic opinion and state practice, of drawing unjustified conclusions from his evidence (for example, at p. 202, that the seabed is *res nullius*, and, at pp. 405-06, that the authorities favored a "reasonableness" over an "adversely affects" test for the freedoms regime).

He does not consider the possibilities that the traditional two-sided debate on the juridical status of the seabed might be sterile, or that a third option might apply, or that the choice might affect the onus of persuasion when states wish new uses to be treated as freedoms, or that rights to sedentary fisheries might have led to the development of and have become subsumed under the continental shelf doctrine rather than the regime of the deep seabed beyond marginal seas. He arbitrarily rejects the possibility that these sedentary fisheries rights (and so, possibly, seabed mining rights, too) might relate to the resources only and not to the seabed itself. He discusses the Goldie and Nyhart theories but not the Northcutt Ely theory. He should also have clearly indicated that many jurists before the 1960s were not careful to distinguish continental shelf from deep seabed. Principles governing the shelf are not, as he assumes, necessarily transferable to the seabed.

In chapter 3 he fails to refute theories concerning the effect of recitation or the existence of an overwhelming, unopposed majority on matters of great moral importance on the binding nature of UN General Assembly resolutions.

In chapter 4 he relies heavily on the conclusions of the International Law Commission on several issues, but dismisses its choice of the "adversely affects" test in favor of UNCLOS I's choice of "reasonableness" as the test for the freedoms regime, simply by assuming the ILC allowed itself to be side-tracked on this issue.

On occasion, Kronmiller makes assertions with no or minimal support or leaves supporting evidence for much later passages. He thus concludes, with virtually no argument, that no hierarchy operates between the freedoms, which ignores many opposing writings and a certain degree of uncertainty in the ILC.<sup>5</sup>

<sup>5</sup> E.g., at the 329th meeting, [1955] 1 Y.B. INT'L L. COMM'N 282-83.

The last chapter may be criticized not only for straining weak analogies, but also as an unnecessary exercise. If he is correct that new uses of the oceans that are "reasonable" are "per se" freedoms, why does he have to seek analogies with established and even, like nuclear testing, controversial uses? Kronmiller is quite correct in concluding that the freedoms are not a closed category, but not in assuming that reasonable uses are "per se" freedoms. The questions arise of who is to determine what is "reasonable," upon what criteria, within which limitations *ratione temporis, loci* or *personae*, and upon whom lies the onus of persuasion, the proponents or opponents. It cannot easily be assumed that mining has become or has remained accepted as a freedom when the vast majority of states deny this.

G. PLANT  
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*Experiences in the Development and Management of International River and Lake Basins.* Proceedings of the United Nations Interregional Meeting of International River Organizations, Dakar, Senegal, 5-14 May 1981. New York: United Nations, 1983. Pp. vii, 424.

The *Proceedings* of the Dakar meeting of 1981 are an important study in that, for the first time, they give an account on a global scale of the practical aspects of water resources management. There have been previous studies, including one by this reviewer, of the work of international water commissions, but never before has so much wealth of information and material been brought together in one place.

The meeting was convened pursuant to a resolution adopted by the United Nations Water Conference, held in Mar del Plata, Argentina, in March 1977; it was subsequently endorsed by the Economic and Social Council, for the purpose of "developing a dialogue between the different organizations on potential ways of promoting the exchange of their experience." The response was certainly impressive. Representatives from 17 international river organizations, 36 countries, 12 agencies and organizations of the UN system, and several other intergovernmental and nongovernmental international organizations attended this first interregional meeting.

The *Proceedings*, like Gaul, are divided into three parts. Part 1 contains the report of the meeting, together with its conclusions, in summarized form. Part 2 contains the background papers which served as the basis for discussions. Part 3 surveys the structure, the powers and the experience of most of the world's river commissions. Altogether, 52 papers discuss these entities in some detail, and all the major rivers of Africa, Asia and Europe are included. The value of such a collection to the researcher and the benefit of the papers for a comparative evaluation of water management cannot be exaggerated. It is good to know that there are so many river commissions and it is to be hoped that they will remain in contact with one another and continue to exchange information.

Data gathering and exchanging information are seen as the most important functions of these institutions and are strongly urged in part 2 of the *Proceedings*, which includes four important background papers by acknowledged authorities. These experts summarize what has been done in the field and give both a theoretical underpinning to the discussions at the conference and an understanding of the more technical reports. They deal with institutional and legal arrangements, progress in cooperative arrangements, economic considerations and river basin planning (based on the experience of that model of river commissions, the International Joint Commission of the United States and Canada).

What emerges from these excellent papers is that, although a lot of good work has been done by private organizations and individuals, there has been very little acceptance by states of general rules. This reviewer, who has spent the best part of his professional life trying to advance certain concepts in water law, cannot but agree—wholeheartedly and sadly—with Dr. Cano's statement: "Except for those rules adopted by treaty, there are no international rules governing the organization and functions of bodies such as those with which this study is concerned" (p. 44). But despair is premature, and the examples Professor Hayton has amassed of potential catastrophe if sound management is not pursued, the advantages of proper cost-benefit analysis shown by Mr. Hansson and the heartening (though here and there spotty) experience of the IJC depicted by Professor Cohen will undoubtedly have a telling effect.

To repeat, and it should be repeated again and again, the great merit of this study is that it has brought together the experience of so many organizations concerned with water resources management. But praiseworthy as this effort is, it has a weakness. Somewhere along the line, the concept of the river basin has lost its luster, though perhaps this is a weakness only in the eyes of one who has so thoroughly identified himself with the concept.<sup>1</sup>

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*The Human Rights of Aliens in Contemporary International Law.* By Richard B. Lillich. Manchester and Dover, N.H.: Manchester University Press, 1985. Pp. xii, 177. Index. \$38.

Professor Lillich tackles a large subject in this succinct and well-analyzed summary of the law governing the human rights of aliens. He traces the virtual absence of any individual rights within the traditional doctrine of diplomatic protection; the alien's state, and not the alien, is the injured party when an offense to the alien occurs in the host state through an act deemed contrary to international law.

One school maintains that as long as aliens and nationals are treated

<sup>1</sup> See L. A. TECLAFF, *THE RIVER BASIN IN HISTORY AND LAW* (1967).

equally, the host state has met its obligations under international law. In opposition is the "international minimum standard" approach, which requires superior treatment for an alien when the state's standards are so low that equality of treatment would not suffice. The debate between these two schools continues and is most acute when acts of expropriation occur. Lillich does not opt for the preferred solution, contenting himself to outline the arguments for each school of thought, and tracing the Calvo Doctrine and its refinements.

Opposition to the traditional approach, particularly to the use of force to redress a wrong committed by the host state, gave rise to various limitations on diplomatic protection elaborated in bilateral treaties and multilateral conventions. The Latin American countries especially approached the subject through international conferences such as those held in Mexico City in 1902 and in Havana in 1928. These resulted in elaboration of the Drago Doctrine prohibiting the threat or use of force by states in general. In addition, bilateral treaties were widely used to manage the large-scale population exchanges following the end of World War I. And the first attempts to deal systematically with the refugee—a special category of alien—were undertaken under the auspices of the League of Nations.

Lillich outlines quite well the fundamental change in approach and outlook that resulted from the UN Charter, the Universal Declaration of Human Rights adopted in 1948 and the multiple UN covenants and conventions dealing with human rights, affording the alien direct rights which in theory he can enforce without the need of intervention by his state. This is particularly evident under the various regional treaties, such as the European Convention on Establishment, the European Social Charter and the Convention on the Legal Status of Migrant Workers. He traces some of the significant jurisprudence developed under the European Convention on Human Rights. Of note are the *East African Asians* cases, especially as they involve the rights of alien husbands to join British wives in England and to reside there permanently.

This is a book that whets the appetite and encourages the student of human rights law to delve further into the unfolding law relating to aliens.

RITA E. HAUSER  
*Of the New York Bar*

*Protecting Human Rights in the Americas: Selected Problems.* By Thomas Buergenthal, Robert Norris and Dinah Shelton. Kehl, Strasbourg, Arlington: N. P. Engel, Publisher, 1982. Pp. xvii, 337. \$19.

Over the past 25 years, the Inter-American Commission on Human Rights (IACHR) has slowly built up an impressive body of precedent and doctrine relating to the defense of human rights in the member countries of the Organization of American States. The Commission itself has been strengthened and a new Inter-American Court of Human Rights has been

established under the terms of the 1969 American Convention on Human Rights, which entered into force in 1978. The Convention has now been ratified by 18 member states of the OAS: Argentina, Barbados, Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru and Venezuela. Six states—Argentina, Costa Rica, Ecuador, Honduras, Peru and Venezuela—have accepted the compulsory jurisdiction of the Court in contentious cases.

The Commission applies the American Convention's provisions in cases involving states parties to it, while continuing to protect the rights enumerated in the 1948 American Declaration on the Rights and Duties of Man, now positive law, in cases involving other OAS member states. The Court, which has decided one contentious case and rendered four advisory opinions, is fully functioning and can be expected to play an increasingly important role as additional states accept its compulsory jurisdiction in individual cases. Thus, the hemisphere now has a fully developed and operational set of institutions for the protection of human rights that is similar, at least in a formal institutional sense, to that established in Europe. This represents a stupendous achievement, given the fact that the participating states are almost all developing countries and include a number in which fundamental and often widespread violations of human rights still occur.

Thomas Buergenthal, Vice-President and judge of the Inter-American Court of Human Rights, Robert Norris, a former staff attorney with extensive experience at the Commission, and Dinah Shelton, a well-known scholar of international human rights law, have joined their efforts in producing a book that thoroughly examines the law and practice of the Commission and the Court. Using a problem or casebook approach, they have drawn on the extensive documentation produced by the Commission (and, to a lesser extent, the Court), as well as the scholarly literature, including, in particular, their own significant contributions. The result is a book that adds flesh and blood to what might otherwise be a somewhat dry analysis of legal texts. It is ideal for use in the classroom.

Following a preface by Alexandre Charles Kiss, the book begins with an introduction (pp. 1-24) that provides an excellent overview of the historical development of international law and institutions for the protection of human rights within the OAS framework. This section includes a succinct analysis of the American Convention, the current operation of the Commission and the Court under their new Statutes, Regulations and Rules, and their relation to other organs of the OAS. In the seven principal chapters that follow, the authors examine in more detailed fashion the following topics: (1) "The Human Rights Obligations of Member States" (pp. 25-65); (2) "The Rights Protected in the Americas" (pp. 66-96); (3) "Protecting Human Rights in An Individual Case" (pp. 97-139); (4) "Widespread Violations: The Country Report" (pp. 140-92); (5) "The Suspension of Guarantees" (pp. 193-215); (6) "Independence, Incompatibility and Impartiality" (of members, judges and staff)

(pp. 216-29); and (7) "The Effectiveness of the Inter-American System" (pp. 230-69). The volume concludes with a selected bibliography (pp. 270-74) and an extremely useful documentary appendix (pp. 275-337) containing the texts of the OAS Charter, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Statute and Regulations of the Commission, the Statute and Rules of the Court, a model complaint form and tables indicating the dates of ratifications of the OAS Charter and the American Convention.

Each of the seven chapters is subdivided into a number of sections that address problem questions relating to the law or practice of the Inter-American Commission and Court. These questions are quite perceptive, and go to the heart of the system's operation and effectiveness. Some sections or "problems" deal with a broad range of issues. Chapter 3, Problem 2 (pp. 99-139), for example, addresses the question, "How is a Petition Examined by the Inter-American Commission?" Here, as in other cases, the broader question is subdivided in logical fashion into individual subsections dealing with admissibility, the exhaustion of domestic remedies, the duty of a respondent state to supply clarifying information on request, the presumption of the veracity of facts alleged when a state fails to respond adequately to an inquiry from the Commission, hearings and the burden of proof, and decisions to close or reopen a case.

Particularly noteworthy in the last-mentioned category is the Commission's general practice of closing a case when a detained individual has been released, notwithstanding the fact that serious human rights violations may have occurred (pp. 128-29). Such practices reflect the vast differences between the European human rights system and the inter-American system in terms of the nature and scale of the human rights abuses they are called upon to control. Tremendous differences between the social and economic conditions prevalent in Europe and those in some countries of Latin America also exist, a point brought home with great force in excerpts from the Commission's reports on Haiti and El Salvador (pp. 36-49). Despite the formal similarity of the rights protected in the European and the inter-American systems, in the latter, the great majority of cases have to do with arbitrary detention, torture and ultimate questions of life or death—disappearances and death-squad or other summary executions.

Within each of the seven main chapters, the authors attempt to answer the questions they have posed mainly by drawing on excerpts from the official documents of the Commission, including individual complaints, resolutions and decisions adopted in individual cases, country reports and annual reports, as well as resolutions and other actions taken by the OAS General Assembly. Excerpts from the scholarly literature are also employed. On the whole, this approach is quite effective in conveying a sense of the very significant impact the Commission may have on the lives of individual human beings, the stark reality of human rights abuses in different countries, and the political factors and considerations that affect and are affected by the Commission's activities.

Like any work, the book is not without its defects. It does not contain

an index, for example. Under the heading "Rules of Procedure for an On-Site Investigation," the International Law Association's 1980 draft rules are included in the text (pp. 146-47), while the norms developed by the Commission itself are mentioned only in a follow-up question (which omits reference to Articles 54-55 of the Regulations, where they are set forth). The development of the Commission's rules is indicative of the great gains of the IACHR, achieved gradually and over time, and deserves somewhat fuller treatment than received here.

Another shortcoming is the failure to distinguish adequately between country reports that result from the genuine initiative of the state concerned, and those that in fact have their genesis in patterns of widespread violations of fundamental human rights. The line is not always an easy one to draw. Still, the inclusion of excerpts from the Panama report (pp. 149-51), which was requested as part of a general strategy for obtaining ratification of the Panama Canal Treaties, seems out of place immediately preceding a fascinating account from the El Salvador report describing the discovery, during an on-site investigation, of secret torture chambers in the barracks of the National Guard in San Salvador (pp. 151-54).

In general, however, these shortcomings are of minor significance. While the selection of specific material for inclusion in each section is not always as complete or judicious as one familiar with the work of the Commission might personally prefer, it is on the whole well done; moreover, other sections provide additional material and insights into the questions raised in any particular section. In this sense, the book should definitely be read and studied as a whole that far exceeds the sum of its parts. Both the organization and the specific content of the questions heading each major section constitute an authoritative guide for any inquiry into the operation of the Commission or the Court.

A further strength of the book is that it raises very important questions that have not always received adequate attention in the past. The chapter dealing with the suspension of guarantees focuses attention on a neglected area, and is particularly good in pointing out the failure of parties to the American Convention to comply with the notification requirements contained in Article 27. Similarly, the work underlines the need for great improvement in the nature and quality of the member countries' annual reports to the Commission regarding the progress they have made in protecting human rights during the previous year (pp. 255-56).

The book raises vitally important questions in a second area, involving possible incompatibilities or conflicts of interest in connection with the election of members of the Commission or judges of the Court, the selection of the staff and, in general, the impartiality of those who are called upon to protect human rights throughout the hemisphere. Little criticism or critical examination of the Commission's internal workings has been published to date. Such reticence is understandable in view of the natural desire not to write or do anything that would detract from its authority or effectiveness. Yet it may well be useful, if not essential, to



take a closer look, particularly in view of the hypotheticals relating to the selection of staff presented by the authors—which might not be so “hypothetical” as one would think.<sup>1</sup>

There is, in any event, a strong need for nongovernmental organizations to become actively involved in the process, at the national level, of nominating slates of individual candidates to be members of the Commission and judges of the Court. It might also be beneficial for them to apply appropriate pressures on their respective governments regarding the votes of the latter in the OAS General Assembly where the final elections are held. Members of the Commission and judges of the Court are required to be “persons of . . . recognized competence in the field of human rights” by Articles 34 and 52 of the American Convention. This standard has not always been met in every case in the past. It would be an excellent idea if the process leading to nominations by states included, as a mandatory step under municipal law, approval by the bar associations, international law societies and human rights groups in each nominating country. The important point is that the effectiveness of the Commission, in particular, very much depends on who its members are.

But while improvements may be desirable, one can only view the work of those who have served on the IACHR over the last 25 years with the greatest admiration. What they have accomplished, and (now with the Court) are accomplishing, is of transcendental importance. Symbolic of their achievements—and those of the peoples of Latin America—is the simple fact of Argentine ratification of the American Convention.

Given the emphasis by the Reagan administration on fostering the growth of democracy, what possible reason could exist for the United States not to join its hemispheric neighbors in ratifying the American Convention on Human Rights? This book should be read by all who are interested in the answer to that question, as well as by all scholars, lawyers, law students and others interested in the protection of human rights.

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*Völkerrecht als Rechtsordnung—internationale Gerichtsbarkeit—Menschenrechte: Festschrift für Hermann Mosler.* Edited by Rudolf Bernhardt, Wilhelm Karl Geck, Günther Jaenicke and Helmut Steinberger. Berlin, Heidelberg, New York: Springer-Verlag, 1983. Pp. xiv, 1057. DM 298; \$123.10.

<sup>1</sup> One reviewer, a lawyer on the staff of the Commission, has deplored the inclusion of this material as “ad hominem attacks against . . . members of the staff, whose identities are lightly disguised.” Cerna, Book Review, 8 HUM. RTS. INTERNET REP. 243, 247 (1982–1983). For a revealing look into the “underlife” of an international organization, which might provide comparative insights into the workings of the OAS, or at least a starting point for inquiry, see R. HOGGART, *AN IDEA AND ITS SERVANTS: UNESCO FROM WITHIN* (1978).

This *Festschrift* honors Hermann Mosler on the occasion of his 70th birthday. It is one of the largest volumes of the Max Planck Institute's series on international law and the number of impressive contributions no doubt owes something to the fact that Mr. Mosler became director of the Max Planck Institute in 1954. His brilliant career led him to be elected one of the first judges of the European Court of Human Rights (1959) and only the second German judge to serve on the World Court (1976), the first having been Walter Shücking (1931).

The 52 contributions to the *Festschrift* are in German (26), English (13), French (10) and Spanish (3), and each deals with one of the three principal themes of the volume: customary law, international jurisdiction and human rights. Six of the contributions are by current or former members of the European Commission on Human Rights or the European Court of Human Rights and another six are by current or former members of the World Court. Considerations of time and space do not allow for a review of all the articles.

Under the theme international jurisdiction, three judges of the World Court (Elias, Jiménez de Aréchaga and Oda) consider the right of intervention by a state in proceedings before the Court, about which Elias notes, there "appear to be as yet no autonomous studies." The judges confront two issues: (1) the reasons for the Court's 1981 denial of Malta's Application to Intervene in the *Tunisia/Libya Continental Shelf* case, and (2) whether Article 62 of the Court's Statute permits intervention by a state based merely on a "general interest" in the development of international law. The judges are unanimous in agreeing that Malta did not allege an interest of a legal nature, it did not seek to become a party to the case and it would not have been bound by the Court's judgment, although Tunisia and Libya would have been and, therefore, Malta should not have been allowed to intervene. As to the second point, Elias and Jiménez de Aréchaga appear to agree that intervention, pursuant to Article 62, should only be allowed to protect a concrete, legal interest and that the would-be intervenor should be obliged to submit an explanation as to how it may be affected (damaged) by the Court's judgment. Intervention to protect a "general interest," they agree, would not be allowed under Article 62.

Oda suggests, however, that if intervention is automatically allowed pursuant to Article 63 (by a state party when the construction of a convention is at issue), it should also be allowed under Article 62 when the "principles and rules" of international law are at issue, for, he asserts, "the interpretation given by the Court of those principles and rules will certainly be binding on the intervening State." Oda's interesting point suggests that Article 59 of the Court's Statute limiting the binding force of the Court's decision<sup>1</sup> is really no protection at all and that third states will be bound by the Court's decisions on "rules and principles" in the same manner as they are bound by the Court's construction of a convention.

<sup>1</sup> "The decision of the Court has no binding force except between the Parties and in respect of that particular case."

In the areas of customary law and human rights, one article that is somewhat conservative politically, but that reflects some provocative conceptual concerns, is *Some Reflections on the European Convention on Human Rights—and on Human Rights* by Sir Gerald Fitzmaurice, a former judge of the International Court of Justice and the European Court of Human Rights. Whereas some governments, such as the Reagan administration in the United States, do not recognize the catalog of economic, social and cultural rights as *real* human rights, Fitzmaurice has his doubts about civil and political rights.<sup>2</sup> The human rights sought to be protected following World War II, writes Fitzmaurice, had to do with protection from “extermination, mass killings, deportations and quasi-enslavement in prison and concentration camps,” and it was “not of political, civil, social or economic rights that most people or governments were thinking.”

For the European organs of protection to fail to distinguish between human rights and civil rights and to treat both equally distorts the system, according to Fitzmaurice: “[T]here comes about a sort of debasing of the currency in connection with human rights if those that are man-made are equated with those that have their roots in nature.” It would be interesting had Fitzmaurice compared the inter-American system with the European, for, given the postwar history of the last 25 years, the American system has had to cope with more human rights violations *stricto sensu* (as Fitzmaurice terms them) than has the European system.

Erik Suy’s incisive article, *Droit des traités et droits de l’homme*, deals with problems in the interpretation and application of human rights treaties in light of treaty law. Inter alia, Suy asks whether human rights norms are *jus cogens* in light of Article 53 of the Vienna Convention on Treaties. Suy cites authors such as McDougal,<sup>3</sup> only to conclude that the notion of *jus cogens* in international law is limited to annulling treaty provisions that are in conflict with it, as a literal reading of Article 53 of the Vienna Convention would indicate. Suy, citing Mosler, suggests that if one limits the concept of *jus cogens* to its original meaning, as a term that applies only to agreements, then it has no application to the field of human rights, since it is improbable that states would agree to undertake to violate fundamental human rights. Suy concludes that whereas certain human rights are imperative law, they do not have the character of *jus cogens* as envisaged by treaty law.

Several other excellent articles are Frowein’s *Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung* and the two articles on the rights of minorities: Partsch’s *Menschenrechte und Minderheitenschutz* and

<sup>2</sup> One can only imagine Fitzmaurice’s reaction to such new human rights as the “right to tourism” or the “right to sleep.” See Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AJIL 607 (1984).

<sup>3</sup> McDougal has written that the Universal Declaration “is now hailed as established customary law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights”; and that “[i]t should be no cause for surprise that the great bulk of contemporary human rights prescriptions . . . should be widely regarded today . . . as among the principles clearly identified as *jus cogens*.”

Tomuschat's *Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights*.

CHRISTINA M. CERNA  
*Of the District of Columbia Bar*

*Die Menschenrechtspolitik der USA: Amerikanische Außenpolitik zwischen Idealismus und Realismus, 1972-1982.* By Friedbert Pflüger. Munich and Vienna: R. Oldenbourg Verlag, 1983. Pp. 405. Index.

This reworked and updated German doctoral dissertation deals with the increasing importance of human rights in U.S. foreign policy. It begins with the 1972 attempt of the U.S. Congress to link expansion of U.S.-Soviet trade to the liberalization of Soviet-Jewish emigration (the Jackson Amendment), and covers, as its central focus, the 1977-1981 Carter administration, which made human rights the "soul" of its foreign policy. It also briefly considers the Reagan administration during the period that ended in 1983.

The work is scholarly, extremely well footnoted and almost encyclopedic (well, it is German) in its attempt to include all the major events and actors of the decade.

Pflüger analyzes U.S.-Soviet relations in terms of the arms control talks, which he maintains succeeded in spite of the Carter administration's relentless criticism of Soviet and East-bloc human rights violations, and he blames the failure to ratify the SALT II Treaty not on Carter's human rights initiative, but on Soviet expansionism—the 1979 Soviet invasion of Afghanistan.

According to Pflüger, Carter's human rights policy gave the United States the political-ideological offensive vis-à-vis not only the Soviet Union, but also the world, in the United Nations and the Organization of American States, where human rights concerns dominated the agendas of their Assemblies. In the Americas, between 1977 and 1981, this human rights policy led to the democratization of the Dominican Republic, Ecuador and Bolivia (for a while), elections in Peru and Honduras and improvements in Uruguay, Brazil, Argentina, Chile, Panama and even Cuba.

In the context of the fall of Somoza in Nicaragua, and of the Shah in Iran, two events that Jeane Kirkpatrick publicly deplored as having resulted in worse successor regimes,<sup>1</sup> Pflüger examines one of Kirkpatrick's more intellectually provocative points. Kirkpatrick asserts that "[a]lthough there is no instance of a revolutionary 'Socialist' or Communist society being democratized, right wing autocracies do sometimes evolve into democracies." She invokes the progress on the Iberian Peninsula as an example. Pflüger, from his European perspective, points out that this

<sup>1</sup> See Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY, November 1979, at 34.

evolution to democracy would hardly have occurred without the pressure on Spain and Portugal of the European democracies, and that Kirkpatrick cannot have it both ways—invoking Spain and Portugal as having achieved successful transitions to democracy and at the same time condemning attempts, such as those of the Carter administration in Nicaragua, to liberalize and democratize authoritarian states. Whereas Kirkpatrick refers to an “evolution” of authoritarian states into democracies, Pflüger reminds us that the staying power of Franco and Somoza was considerable, and during those four decades there was little “evolution” towards democracy.

The arrival of the Reagan administration did not lead to hemisphere-wide right-wing coups as predicted by some observers, and Reagan's policies in supporting, for example, Duarte in El Salvador, follow, *grosso modo*, the same reformist policy initiated by the Carter administration. In fact, Kirkpatrick's criticism of the Carter administration could be applied to Reagan's support for liberalization and democratization in El Salvador.<sup>2</sup>

If Pflüger's book is representative of European thinking about Carter, his policies are not seen as transitory, and his human rights policy has assured him his place of importance in world history, despite his current unpopularity in the United States.

CHRISTINA M. CERNA  
*Of the District of Columbia Bar*

*Prawa Człowieka w Systemie Norm Międzynarodowych.* By Anna Michalska. Warsaw: Państwowe Wydawnictwo Naukowe, 1982. Pp. 427. English summary. Zł. 160.

In her book entitled “Human Rights in the System of International Norms,” Dr. Anna Michalska, a well-recognized socialist expert on the subject,<sup>1</sup> attempts to provide “a relatively clear analysis of all human rights established in international law” (p. 10). The book, published in Poland under martial law, is descriptive rather than analytical. It amounts to a useful guide to numerous international instruments protecting human rights.

The author identifies the legal foundations as well as the general principles and features of human rights (chs. I–III, pp. 11–127) and then surveys, one by one, civil and political rights (ch. IV, pp. 128–89), socioeconomic and cultural rights (ch. V, pp. 189–238), and the rights of certain categories of protected persons such as women, minorities, aliens and refugees (ch. VI, pp. 238–88). Michalska next discusses the regional regulation of human rights (ch. VII, pp. 291–342), promoting the idea of a human rights convention

<sup>2</sup> Cf. Kirkpatrick, *supra* note 1: “In each of these countries, the American effort to impose liberalization and democratization on a government confronted with violent internal opposition not only failed, but actually assisted the coming to power of new regimes . . . hostile to American interests and policies.” *Id.* at 35.

<sup>1</sup> See the review of her book *PODSTAWOWE PRAWA CZŁOWIEKA W PRAWIE WEWNĘTRZNYM A PAKTY PRAW CZŁOWIEKA* by Richard Szawłowski in 73 AJIL 318–19 (1979).

confined to socialist states. Finally, the author deals with the execution of human rights treaties (ch. VIII, pp. 343-84), seemingly retreating from her earlier position on the self-executing character of at least some of these treaties. She concludes her study with remarks on the status and perspectives of the international law of human rights.

Michalska tends to present the material in a manner devoid of any strong ideological involvement. She is concerned with the law on the books and not the law in practice. Yet, it should be noted that her thoughts at times depart significantly from the mainstream of socialist doctrine. The author affirms, for example, that states have consented to exclude human rights from matters "which are essentially within their domestic jurisdiction" (p. 7) and boldly supports the idea of international control of the enforcement of human rights (pp. 391-92).

One is inclined to share Michalska's belief that there is no need for further proliferation of international provisions relating to human rights; the main task facing the community of nations today is to ensure their full implementation in practice (pp. 388-89). But what is the substance of the rights to be so implemented? The author's answer to that question is far from clear. On the one hand, she admits that the primary purpose of the international law of human rights is "to guarantee each human being certain values common to the whole of mankind" (p. 8); she asserts that the existing catalog of human rights "is sufficient, i.e., it guarantees the fulfillment of the basic needs of each human being, no matter in what conditions he lives" (p. 388). On the other hand, Michalska maintains that such a catalog "may be assessed only on the basis of a particular doctrine of human rights. And since there are many doctrines, we end with various assessments. One should not expect any agreement with regard to the essence of human rights" (p. 387).

It is difficult to see how these two views can be reconciled. If the latter is true, then we have to conclude that the international law of human rights does not in fact exist. Perhaps this is not what Michalska intended her statement to mean. However, her ambiguity, if not incoherence, in addressing the central problem of the essential universality of human rights is disturbing.

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*International Financial Law* (2d ed.). 2 vols. Edited by Robert S. Rendell.  
London: Euromoney Publications, 1983. Vol. I: pp. xvi, 200; vol. II:  
pp. viii, 187. \$85/vol.; £55/vol.

This is not a public international law book dealing with money or finance such as Arthur Nussbaum, F. A. Mann or Milan Shuster might have given us (the book does in fact include a chapter by the invaluable publicist, Sir Joseph Gold). This is, rather, a book for practitioners and government officials. It is divided into three parts: (1) 11 chapters on private international lending; (2) 5 chapters on international capital

transfers; and (3) 11 chapters on international and governmental financial institutions. As readers of such rather new publications as the *International Financial Law Review* (produced by the same publisher as this book) will know, the amount of writing in these areas continues to grow and develop.

Robert Mundheim, dean of the Pennsylvania Law School, correctly indicates in his introduction to the work that it is an "excellent introduction for the reader desiring an overview" and a "compact reference tool for the practitioner confronted with a problem in international finance" (the detailed table of contents makes up for the absence of an index). Moreover, the editor, Robert Rendell, has seen to it that in almost all of the chapters a high level of quality is maintained.

Part I deals with such subjects as loan agreements, ship finance documentation, rescheduling of debt, U.S. and UK sovereign immunity, and U.S. regulation of American bank lending abroad and of foreign banks in the United States. It concludes with the obligatory chapter on the lessons of the Iranian hostage crisis, in this case for international financial law. Highlights are the distinguished discussion of term loan agreements by Francis D. Logan and Peter D. Rowntree, which brings out the dynamics of lender-borrower relations and also relations among syndicated lenders; and, complementing it, the chapter by Reade H. Ryan, Jr., on the practicalities of international bank loan syndications and participations (including SEC aspects). The latter raises and sometimes answers many previously unanswered questions about the duties of syndicate members and their managers, agents and counsel. These chapters might easily have been even longer.

The vast growth in private lending to sovereign borrowers in the past decade or two, the rise in problems of enforcement of repayment and the increasing restriction of the previously absolute sovereign immunity doctrine come together in the two chapters on English and U.S. sovereign immunity law and practice (the chapters do not address act of state or *Allied Bank International*<sup>1</sup> issues as extensively as some might wish). We learn, interestingly, that while in term loan agreements borrowers give explicit waivers of sovereign immunity—reinforcing the effect of the sovereign immunity statutes—in bond issues waivers are not so common; bank lenders presumably exercise a clout that an as yet presumably unidentified group of bond purchasers does not.

Part II deals with capital controls in the United States (the SEC), Europe, Japan and Latin America, and with international mutual funds. It contains interesting, but not particularly novel, material. I would say the same for part III. Gold's chapter on the IMF, "Balance of Payments Transactions of the International Monetary Fund," maintains his very high standard and has an excellent treatment, paragraph by paragraph, of the Fund's decision of March 2, 1979 on "conditionality," and a brief section on the relationship of private lending and the Fund's activities.

<sup>1</sup> *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, No. 83-7714 (2d Cir. Apr. 23, 1984), *vacated and rev'd*, 757 F.2d 516 (2d Cir. 1985).

Since rescheduling of debts has become important, there has been greater interaction of both private sector lenders and government lenders (through the Paris Club) and the IMF. The chapter by David Suratgar and Antonio Parra on Middle Eastern financial institutions, listing the many Arab and Islamic institutions and their programs, is instructive.

This work reminds us of the historic importance of the recent interaction of principally Western private lenders and Third World (and some other) borrowers. Clearly, the debt crises of the last few years have focused our attention on debt, and on the conditions, legal and otherwise, of lending and borrowing. The vast amount of indebtedness of the developing, and some other, countries suggests some difficulties with the Third World orthodoxy of "unpackaging" technology transfer and finance (to be sure, certainly not the principal cause of the crises). The reader wonders whether there may not be some movement back towards the "package" of foreign direct equity investment.

As previously suggested, Olympian and speculative issues of public international law, state responsibility and possibilities of state bankruptcy and repudiation of debts are not discussed. The book is no less valuable for this, and this reviewer commends it highly to readers interested in the subjects it covers.

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*Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.* Edited by the Permanent Bureau of the Hague Conference on Private International Law. Antwerp and Apeldoorn: Maarten Kluwer's Internationale Uitgeverij, 1983. Pp. vii, 150. BF 750; Dfl.42.50.

This *Practical Handbook* had its genesis in a recommendation made by a "Special Commission of Experts" that was convened by the Hague Conference on Private International Law in November 1977 to study the implementation of the 1965 Hague Service Convention.<sup>1</sup> The Special Commission was composed of representatives of the "Central Authorities" of the then 18 member states that had ratified the Convention.<sup>2</sup>

During the discussions of the Special Commission, it became apparent that the Central Authorities were generally unaware of the manner in which requests for service of judicial documents originating in their states

<sup>1</sup> 20 UST 361, TIAS No. 6638, 658 UNTS 163.

<sup>2</sup> The Report of the U.S. Delegation to the Special Commission was published in 17 ILM 312 (1978) (excerpt), and in 1978 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 865 (excerpt). The report of the Conference's Permanent Bureau on the work of the Special Commission was published in 17 ILM 319 (1978).



were executed by other states. This is so because under the scheme of the Convention, the Central Authorities serve only as recipients of service requests *from* other Convention states, and they do not become involved in the transmission (or return) of service requests that originate in their states and are sent *to* other Convention states for execution. The Special Commission urged the Permanent Bureau of the Hague Conference to conduct a survey of all member states regarding the provisions of their domestic laws and the procedures and practices employed in executing foreign requests for service under the Convention, and to publish the results of the survey. This *Handbook* incorporates in large measure the result of that survey.

After reprinting the French and English texts of the Convention and a list of ratifications of (or accessions to) the Convention, part 1 of the *Handbook* summarizes "Some general remarks concerning the practice of the Convention." The summary is based on the discussions of the Special Commission and contains quotations from, and references to, the Explanatory Report on the Convention prepared by its rapporteur, Mr. V. Taborda Ferreira of Portugal.<sup>3</sup>

Part 2, "Transmission of requests for service by the Central Authority," offers detailed information for each member state on (1) the manner in which foreign requests for service are dealt with by the Central Authority and the state agencies charged with the actual service of the documents in the requested state, and (2) the forwarding authorities (i.e., the authorities in the requesting state competent to send requests for service to the Central Authority of other member states).

Part 3, "Other channels of transmission," deals with service through consular or diplomatic channels, by mail, through process servers and through other channels.

Part 4, "Guarantees under the Convention," summarizes the declarations of the member states under Articles 15 and 16.

The *Handbook* ends with (1) a reprint of a recommendation made to all member states of the Hague Conference in 1979<sup>4</sup> that additional information accompany judicial documents to be sent or served abroad to ensure that the recipient gets reasonable notice of the nature and purpose of the document, and (2) a comprehensive bibliography on the Service Convention.

This is a most helpful and authoritative handbook for the practitioner who seeks to determine the practices and procedures of other member states; it does not pretend to be a scholarly commentary on the Convention. It is to be hoped that the Permanent Bureau of the Hague Conference not only will periodically supplement the *Handbook* (published in loose-leaf form) with updated information on the domestic laws and practices of the member states and of new states joining the Convention regime, but also

<sup>3</sup> CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, 3 ACTES ET DOCUMENTS DE LA DIXIÈME SESSION 363 (1965) (available only in French).

<sup>4</sup> *Id.*, 1 ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION 41 (1980).

will offer in future updates a synopsis of decisions from the courts of the member states interpreting and applying the Convention.

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*Sovereign Lending: Managing Legal Risk.* Edited by Michael Gruson and Ralph Reisner. London: Euromoney Publications, 1984. Pp. 257. \$85; £55.

Lending to sovereign borrowers is a practice that dates back to the Renaissance and perhaps even to classical times. But sovereign lending really came into its prime in the 1970s and early 1980s, following the OPEC oil price increases. The responsibility for recycling billions of "petrodollars" fell upon the commercial banking community, and this recycling took the form of syndicated loans and other types of credit facilities extended to developing countries and their governmental instrumentalities.

These lending activities came to an abrupt halt in August 1982 when Mexico announced that it did not have sufficient cash reserves to continue servicing its external debt. Since then, commercial banks doing business in the developing world have been principally occupied with problems of collectibility of sovereign debt and rescheduling. Of course, industrialized countries have maintained their access to financial markets and commercial bank credits, and a limited number of project financings in developing countries have been concluded.

*Sovereign Lending: Managing Legal Risk* covers both aspects of these activities and constitutes a valuable contribution to the growing body of legal literature on international finance. The book, composed of 20 essays, has been edited by Michael Gruson, a New York lawyer, and Ralph Reisner, professor of law at the University of Illinois. In their introduction, the editors state the basic theme that underlies these essays: "What are the special, often unique, characteristics of sovereign lending? What are the special problems a lender will encounter if he leaves the traditional arena of lending to individuals and private juridical entities and seeks, instead, a place in the sovereign debt market?"

Most of the essays are written by American and English practitioners, and the emphasis of the book is on the pragmatic side of lending to sovereign borrowers. For example, a number of essays are devoted to legal issues that arise in drafting contractual arrangements with sovereigns. These include choice of law and choice of forum, questions of sovereign immunity and the rights and duties of managing and agent banks. These issues are discussed from the American and English points of view by lawyers from each country. Additional essays cover the regulatory aspects of sovereign lending, including recent U.S. legislation relating to international lending by U.S.-based banking institutions.

Rescheduling problems are dealt with in two essays, once again by

American and English lawyers. Together they provide a good introduction to this complex subject. The best chapter in the book, by Reade Ryan, examines default and remedial issues in great detail. Ryan's essay, and additional material on the American and English law of setoff, should be of interest to lawyers representing financial institutions that lend to private as well as sovereign borrowers.

The editors have attempted to deal with recent developments under the act of state doctrine that affect the collectibility of sovereign debt, but the publication schedule of the book precluded full treatment of this rapidly evolving field of law. No doubt future works will treat this subject in greater depth. Another development that merits greater attention is the recent enactment of legislation in New York State recognizing contractual choice-of-law and choice-of-forum provisions regardless of the contacts with New York. Presumably, Gruson, who is an authority on this subject, was constrained by time considerations from including a discussion of the effect and consequences of these statutory changes on international lending.

These shortcomings should not detract from the overall value of this book. *Sovereign Lending* will be of interest not only to financial lawyers, but to scholars and practitioners working in the public international law area. Of particular interest to international lawyers are a number of essays, some already noted, on such subjects as sovereign immunity, act of state, state succession and claim settlements.

In sum, *Sovereign Lending* is an indispensable addition to the library of any lawyer working on international financial matters.

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*The OPEC Fund for International Development: The Formative Years.* Edited by Ibrahim F. I. Shihata, Said Aissi, Mehdi Ali, A. Benamara, Antonio R. Parra and T. Wohlers-Scharf. New York: St. Martin's Press, 1983. Pp. 289. Index. \$32.50.

The student of international economic organizations will find this small book of particular interest. Dr. Ibrahim F. I. Shihata, former General Director of the OPEC Fund and, at present, general counsel of the World Bank, has written the largest part of this study, but there are sections written by a number of his former colleagues at the OPEC Fund as well.

The OPEC Fund, formed in 1976, had very modest and tentative origins. The Fund began as an international special account, rather than an international organization, with an initial endowment of \$800 million. The organizers viewed the OPEC Fund as a "one-shot exercise," providing in its charter that loan repayments would be returned to the donor members. In less than 4 years, the OPEC Fund's assets had grown more than 400 percent, the Fund had amended its charter to permit the use of

loan repayments in the future operation of the Fund and the Fund itself had become an intergovernmental organization making loans in its own name. By April 1983, the Fund had approved 328 loans, for a total exceeding \$1.8 billion, to 82 countries.

In describing how the OPEC Fund has grown, Shihata and his colleagues also make a useful point of interest to the organizers of new international organizations. They remind us that the organizers of the OPEC Fund were not overly ambitious in their initial plans, and that they took care to structure an organization that member governments would accept and use. By not attempting in the drafting of its governing instrument to cover every eventuality, the founders gave the organization flexibility, so that as the members acquired confidence in the OPEC Fund, it could evolve into a more powerful institution.

In addition to describing the formation of the OPEC Fund, this volume also outlines the Fund's development program. Although membership in the OPEC Fund is limited to OPEC member countries, only the governments of non-OPEC countries and international development agencies may receive development aid. Shihata and his colleagues convincingly argue that the OPEC Fund is not directed at countries that are the principal market of the OPEC members. There are chapters on the commendable priority given by the Fund to the least developed of the developing countries and on the Fund's emphasis on financing for agricultural development and on alternative and renewable sources of energy. In administering its development assistance program, the Fund has mostly relied on other institutions for loan appraisals, thus avoiding the need for a large staff, and it has frequently cofinanced development assistance with other institutions.

Despite its initial success, Shihata and his colleagues note that the future of the OPEC Fund is uncertain. The OPEC Fund is not a bank and cannot, therefore, borrow on the open market as do the World Bank and the Inter-American Development Bank. The member countries have also not agreed to make fixed and regular capital increases to the Fund.

This volume does have its drawbacks. It is repetitious in places, the writing is uneven and the footnoting of sources varies from chapter to chapter. The study could have benefited from more careful editing. It also wanders from its central theme into a more general discussion of the need for a renewed dialogue on economic assistance between the developed and developing countries. This reviewer wishes that the editors had concentrated on the OPEC Fund and saved for a separate volume their suggestions for new forms of development assistance.

This criticism aside, the volume, besides providing an interesting account of the operations of the OPEC Fund, is a useful contribution to the study of international financial organizations.

DUNCAN H. CAMERON  
*Of the District of Columbia Bar*

*Multinationals in a Changing Environment: A Study of Business-Government Relations in the Third World.* By Adeoye A. Akinsanya. New York: Praeger Publishers, 1984. Pp. xvi, 335. Index. \$34.95.

In the late 1960s and early 1970s, the multinational corporation was the subject of intensive study in connection with external investments in developing countries. In books ranging from Barnet and Müller's *Global Reach*<sup>1</sup> to Ray Vernon's *Sovereignty at Bay*<sup>2</sup> and George Ball's *Global Companies: The Political Economy of World Business*,<sup>3</sup> the multinational frequently has been portrayed as the central player (whether hero or villain) in the economic development of Third World states. For the past few years, however, the multinational has seemingly taken a back seat to public attention on macroeconomic issues such as the international debt crisis and related IMF conditionality issues.

Given this context, now would not appear to be a particularly opportune time for a new book on the role of the multinational. However, Professor Akinsanya's *Multinationals in a Changing Environment* is in fact a particularly timely consideration of a number of ongoing issues. The reason for this timeliness is somewhat perverse: with the decrease in debt-based international financing that has accompanied the recent debt crisis, developing countries are now becoming more receptive to direct equity investments by corporations from developed countries. Multinationals are important again.

Akinsanya's approach is essentially one of examining the various claims made either against or on behalf of the operations of multinational corporations in developing states and then offering evidence to prove or disprove the various contentions that are made. For example, he reviews the positive claims concerning transfers of technology, increased employment and capital infusion that are typically associated with external investments by multinationals. He also analyzes the reasons behind the establishment of foreign affiliates and subsidiaries by multinationals, including government investment incentives, cheap labor and market expansion. In addition, he gives an interesting statistical analysis of the bases for many of these developments.

However, despite the breadth of coverage included in this volume, Akinsanya's argument is essentially a pejorative one. It might be an overstatement to say he considers multinationals as "despoilers" of the Third World, but not much of an overstatement. Even more to the point, he feels that the influence of multinationals has been broken and that there has been a fundamental shift in the previous balance of power between multinationals and host states. He argues that developing countries only progressed from political colonialism to economic colonialism as a

<sup>1</sup> R. BARNET & R. MÜLLER, *GLOBAL REACH* (1974).

<sup>2</sup> R. VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES* (1971).

<sup>3</sup> *GLOBAL COMPANIES: THE POLITICAL ECONOMY OF WORLD BUSINESS* (G. Ball ed. 1975). Also see Silkenat, *Regulating Global Companies*, 28 STAN. L. REV. 381 (1976).

result of winning their independence, but that this continuing dependence is now effectively being shed as a result of the economic nationalism that blossomed during the oil crisis in the mid-1970s.

While Akinsanya makes some telling points (the excesses of ITT in Chile are a good example), he vastly overstates his case and ignores too much of current practice. When collected and summarized, Akinsanya's arguments seem polemical at best: (1) "MNC's are vehicles through which capital resources are transferred from capital-poor countries to capital-rich countries"; (2) MNCs destroy local jobs by introducing new technology; (3) the technology transferred is usually "inappropriate, obsolete, overpriced and inconsistent"; and (4) MNCs create deterioration of normal social forces (this is because, strangely enough, they tend to pay comparatively higher salaries than domestic companies).

Akinsanya's prescriptions for the future are also of a mixed quality. While he rightly calls for greater self-sufficiency and massive investment in education and in research and development activities by developing countries, he also calls for industrial spying and "radical structural transformation so as to smash local allies of MNC's." He closes with his most openly ideological statement: that the necessary measures for developing the Third World "can only be successfully implemented within the framework of a centrally planned (socialist) economy." To have ignored the positive examples of private sector initiatives in Korea, Hong Kong and Taiwan, and to have discounted the disappointing results in those parts of Africa that have followed the author's views, is this book's biggest failure. However, Akinsanya's approach is a stimulating one, even if, on balance, it does not take account of all that it should.

JAMES R. SILKENAT  
*Georgetown University*

*Nationalization of Foreign Property: A Study in North-South Dialogue.* By Subhash C. Jain. New Delhi: Deep & Deep Publications, 1983. Pp. 298. Indexes. Rs. 125.

This is a welcome addition to a growing list of Indian publications on international law. The subject of the study is of interest to all and central to promoting an international flow of capital, technology and goods and services. Written by an Indian scholar, the study derives special appeal from its cogent and convincing presentation of perspectives of developing Third World countries on issues related to the regulation of foreign companies' investments and activities in their countries, including nationalization or expropriation of foreign property.

This is essentially a legal analysis of concepts that are often confused and controversial. Nationalization, expropriation, requisition, confiscation and concession agreements are all defined and distinguished; elements of "prompt, adequate and effective compensation" are critically examined on the basis of state practice, UN resolutions, judicial decisions and

scholarly opinion, and their legal content clarified; the role of exhaustion of local remedies, scope of "denial of justice" and the invocation of diplomatic protection and, finally, the state practice of India and other developing countries in dealing with foreign investments, expropriation and nationalization are also competently and concisely discussed.

The author brings to his study the zeal of a concerned observer. He points out forcefully the inequity and injustice that were invariably involved in investments made, concessions granted, conditions approved and laws enacted as foreign companies sought exclusive and exploitative control of raw material, natural resources and labor in developing countries during the colonial era. It is the author's contention, reasonably supported by the evidence cited, that the law on the subject is not as settled or as firm in its defense of all foreign investments or operations, irrespective of reciprocities, and that the law of compensation is not as rigid or as one-sidedly in favor of the foreign investors as it is often made out to be by certain writers. He makes a useful distinction between foreign economic operations in developing countries prior to and after their independence. He suggests that different approaches and criteria need to be applied to regulate foreign investment attracted after a country's independence. He also indicates that developing countries must show a certain tolerance and appreciation of the needs and interests of foreign economic operators from other developing countries, as opposed to those from developed countries, in a spirit of South-South cooperation. He urges the promotion of foreign investment under conditions of mutuality of interests and benefits and due respect for the social, economic and cultural needs of peoples of developing Third World countries.

Mr. Jain's study is generally well researched, documented, balanced and brief. It should appeal to students and teachers, particularly those from Third World countries. It is one of the few comprehensive, yet concise, treatises on the subject, available at a reasonable price.

The author could have improved the appeal of his book if he had concentrated on fewer issues and presented the material from a more critical and personal perspective. His own preferences and views are often lost in the host of references given to others' views, though this is to some extent remedied in the last chapter, in which the author summarizes his own conclusions.

The Indian publisher deserves credit for encouraging publications such as this and for having done a thoroughly professional job in meeting international standards of printing and accuracy in reproduction.

P. SREENIVASA RAO\*

*Permanent Mission of India to the United Nations*

*Die französischen Verstaatlichungen.* By Geneviève Burdeau. Heidelberg: Verlagsgesellschaft Recht und Wirtschaft mbH, 1984. Pp. 115. DM 64.

\* The reviewer is writing in a personal, not an official, capacity.

In 1981 a left-wing coalition won a majority in the French National Assembly. In 1982 the National Assembly decreed the nationalization of the five largest industrial enterprises in the country, 39 banks and two finance corporations.

The nationalization law provided that 100 percent of the shares of corporations designated for nationalization be transferred to government ownership, with the exception of a few corporations in which the Government obtained only a controlling interest such as Dassault, the large defense contractor. Compensation to the former owners of approximately 35 billion francs was not paid in cash but in the form of 15-year government debentures, which are traded at the stock exchange.

These nationalizations ranged from cases where the change hardly mattered because the Government had previously guaranteed the firms' enormous debt, as in the steel industry, to those with severe consequences, as in the banking industry whose nationalization gave Paris a bad name as a banking center. Today, only banks of insignificant size and those that are 50 percent or more foreign owned are still privately owned and not controlled by the French Government.

The Government controls its newly acquired industrial enterprises through a board of directors consisting of 17 members; six members are governmental officials, six are elected by the employees of the corporation and five are elected by the Government for their special expertise or skills in the area of business of the corporation. The board of directors elects, from its members, the officers of the corporation (Directors General).

The author, a law professor at the University of Dijon and its Institute of International Relations, presents a most interesting introduction to the French manner of thinking about the "democratization" of industry and the history of nationalizations in France. France, like many other European countries, nationalized its railroads, mail services, telephone and telex services, airline industry and some banks in connection with the Depression of the 1930s. In 1945 France nationalized the large auto maker Renault and a number of other large corporations that supposedly collaborated with the enemy or operated key industries such as utilities, coal, insurance and air transportation. The author gives us all the justifications that were put forward, including the need to save the ailing coal and steel industry and to assert governmental control over the French nuclear and defense industry.

In 1982 the recession with its unemployment, inflation and the growing competition from international companies provided legitimization for nationalization in some instances, but not, however, with respect to the profitable finance companies Suez and Paribas. This leads to the realization that the "battle for nationalization" was ultimately one of ideologies—state capitalism versus private capitalism—and to a limited degree only one of economic necessities, and was thus a battle for the souls of the people. This conclusion is further evidenced by the indiscriminate use of the terms "nationalization," "democratization," "socialization" and "expropriation" during the heated public debates that accompanied the legislative process.



Professor Burdeau, without attempting to expose the underlying ideological fight, acts as a thoroughly knowledgeable and thoughtful guide through the complex field of French constitutional law, which the French Government took great pains to comply with in structuring the nationalizations of 1982.

The reader learns that the highest French constitutional court, the Conseil Constitutionnel, was called upon several times to render decisions on the legislative procedure of the nationalizations and about the formula for payment of just compensation. The original texts of these decisions form part of an appendix at the end of the book. To avoid some of the conflict, the Government decided to return to private ownership such subsidiaries or divisions of nationalized companies that were not engaged in key industries or monopolies, which in French legal thought must be owned by the state.

Of similar concern to the Mitterand Government was the avoidance of any and all possible conflict with international law, especially to prevent possible protests from international organizations or retaliation from other countries. In this connection, the book contains a discussion and overview of practically all of the most recent international cases on expropriation, including the *AMINOIL / Kuwait*, *TOPCO v. Libya* and *BP v. Libya* arbitrations, as well as the relevant literature on these cases and the French nationalizations.

The nationalization law, in an attempt to avoid international confrontations, contains an exemption for foreign banks, which are defined as banks where the capital held by aliens exceeds 50 percent. (This approach, of course, caused several banks to increase their foreign capital in time to avoid nationalization.)

While fear of international retaliation was great, nothing really happened except for two private lawsuits, one in Belgium and one in Switzerland. France felt encouraged by the fact that no protest was received from the United States when Renault acquired a majority interest in the American Motors Company in 1981 from Godfrey Davis. Likewise, no protests were received when Crédit Lyonnais acquired a majority share in the seventh largest Dutch bank and when Elf-Aquitaine took over the controlling interest in Texas Gulf.

Special agreements between the French Government and foreign parent companies were reached in cases where French companies had strong foreign bonds and were dependent on foreign technology, as with the French ITT subsidiaries and the Hoechst affiliate, Roussel-Uclaf. We also learn of the Mitterand Government's painstaking efforts to avoid any violation of the Rome Treaties, the European Human Rights Convention, bilateral treaties for the protection of investments and the Charter of the United Nations.

Clarity of style and precision in terminology allow the author to take the reader through the dense net of international legal provisions with ease. The book provides anyone with limited exposure to this fascinating body of laws with an interesting and concise introduction.

With respect to the rules of private international law, the French

nationalizations of 1982 have caused extensive discussion by specialists on the subject, including J. Dohm of Geneva, whose articles are mandatory reading for anyone involved in this controversy. The book refers, in its numerous footnotes, to the various articles that have resulted from this discussion and the meeting organized by the International Chamber of Commerce in February 1982. This discussion reminds one of the debate surrounding President Carter's decision of November 14, 1979 to freeze Iranian assets in the United States.

The questions relating to the extraterritorial effects of expropriation remain open and further litigation in foreign jurisdictions can be expected. Burdeau does not try to propose a solution but provides an overview of the manifold suggestions that have been advanced by the various leading legal scholars in the field.

She has written a book that is worth owning and should be translated into English so as to reach a larger readership. However, notwithstanding its brevity (63 pages of text, 52 pages of documents), it is unfortunate that the volume lacks a bibliography and a table of cases, which would serve as useful reference material.

EBERHARD H. RÖHM

*EEC Antitrust Procedure. Supplement 1984.* By C. S. Kerse. London: European Law Centre Ltd., 1984. Pp. xi, 69. £12.

This *Supplement* to the original book<sup>1</sup> includes developments through February 1984. The book has become a standard reference work in the field. It is the only book dealing with the practical problems involved in facing a European Community (EC) Commission investigation under EC competition law. The author's thorough review and copious citation of new developments are extremely valuable.

American readers will note with particular interest the discussion of the Court of Justice's *AM & S* decision,<sup>2</sup> which recognized that there exists as a principle of Community law the protection of confidentiality of certain communications between lawyer and client. The Court acknowledged that a person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it (point 18). The Court held that Regulation 17 must be interpreted in such a way as to protect the confidentiality of lawyer/client communications, subject to two conditions: first, the communications must be made for the purposes and in the interests of the client's right of defense; second, the communications must emanate from independent lawyers (points 21 and 22).

<sup>1</sup> Reviewed at 77 AJIL 191 (1983).

<sup>2</sup> *Australian Mining & Smelting Europe Ltd. v. E.C. Commission*, Case 155/79, [1982] 2 Common Mkt. L.R. 264.

Part III sets forth the author's conclusions from parts I and II and offers, very briefly, a general evaluation of and suggestions concerning Spain's treaty policy in this area.

Inasmuch as in a work of this type reliability is an especially important factor, I note that all the citations I investigated were accurate and supportive of the text. Overall, the study is a fine work of scholarship that will benefit not only Spain but all those interested in the attitudes of states toward the settlement of disputes through arbitration.

DAVID D. CARON

*Iran-United States Claims Tribunal*

*Recht, Verwaltung und Justiz im Nationalsozialismus: Ausgewählte Schriften, Gesetze und Gerichtsentscheidungen von 1933 bis 1945.* Edited with commentary by Martin Hirsch, Diemut Majer and Jürgen Meinck. Cologne: Bund Verlag, 1984. Pp. 590. Index.

It is particularly noteworthy when German jurists produce a book to illustrate how law and the judicial system were mutilated during the dozen-year reign of Adolf Hitler's "Thousand-Year Reich." Martin Hirsch, the distinguished Social Democratic legislator and former judge of West Germany's Constitutional Court, Professor Diemut Majer, whose outstanding tome on the mistreatment of "ethnic foreigners" was reviewed in this *Journal*,<sup>1</sup> and Jürgen Meinck of the University of Göttingen have assembled a fair cross-section of decrees, decisions, speeches and commentaries to show how the mantle of pseudo-legality was used to cloak the malevolent political and racial designs of a ruthless dictatorship. The collection is intended to be no more than an introduction to this sordid chapter of German history. The documents offer no apology for National Socialism but reveal its true character. Even before the outbreak of World War II, law was used as an instrumentality to intimidate opponents of the Nazi regime; during the war, all restraints were removed.

The book is divided into five parts, each of which has several chapters. Part 1 shows how the constitutional democracy of the Weimar Republic was overwhelmed, clearing the path for the satanic regime that took its place. A 1933 "Enabling Law," which authorized emergency measures to combat the economic depression, became the vehicle for the new Führer's expanded legal authority. The courts, suffused with antidemocratic and anti-Semitic sentiments, tolerated or encouraged the abuse of power. Part 2 reveals how concepts of constitutional law were systematically distorted: the "Leader Principle," the nationalistic and racial doctrine that citizens

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some 4,000 include a special compromissory clause providing for the pacific settlement of disputes relating to the interpretation and application of the treaty itself [Sohn, *Settlement of Disputes Relating to the Interpretation and Application of Treaties*, 150 RECUEIL DES COURS 195, 259 (1976 II)].

<sup>1</sup> 76 AJIL 449 (1982).

must all be members of one ethnic community, and the political dogma mandating unity of party and state, were among new legal theories that permeated all aspects of German life. The third part shows how public law fell under the influence of the oppressive dictatorship, how civil service laws were revised to exclude Jews, how power was transferred from the regular police to the Gestapo (Secret State Police) and how nationality, tax and property laws were used to divest political opponents of citizenship and assets. In part 4, we see how non-Aryans were deprived of contract rights, how family law was revised to bar intermarriage with those regarded as racially inferior, how landlord-and-tenant and labor laws compelled discrimination, and how a compliant judiciary ignored its noble legal tradition to accommodate the regime in power. Germany's 20th-century reversion to barbarism is depicted in the concluding section, which outlines how legal procedures and criminal laws were twisted to achieve the goals of the Nazi system. In the words (translated) of Professor Diemut Majer, the documents depict "[a] legislative and bureaucratically organized discrimination and deprivation of rights of whole groups of the population because of their race, their religion or their political conviction, that prepared the way for their physical extinction, that is to say, murder" (pp. 34-35).

Many of those whose statements are here reproduced to show how lawlessness masqueraded as law have paid for their perversion of justice. Hitler, Goebbels, Göring and Justice Minister Thierack died by their own hand. Gestapo Chief Heydrich was assassinated; Freisler, head of the notorious People's Court, perished in an air raid; Hans Frank, president of the German Bar Association, after confessing to mass murders on an incredible scale, was hanged for his crimes in Poland; Police Chief Daluge was hanged in Prague; Minister Frick, who issued the Law for the Protection of German Blood and Honor, was hanged at Nuremberg, where international tribunals sentenced several others whose own words and records condemn them for their evil deeds. Much of what is here disclosed was, of course, documented during the Nuremberg prosecutions and elsewhere. But the advantage of the present compilation is that it bears the imprimatur of unchallengeable German scholarship and is assembled in one clearly written and easily accessible volume. The book is a significant contribution to the literature and a credit to the authors and the publisher.

BENJAMIN B. FERENCZ  
*Former Executive Counsel,  
Nuremberg War Crimes Trials*

*Terrorism: Documents of International and Local Control. Volume IV: A World on Fire.* By Robert A. Friedlander. London, Rome, New York: Oceana Publications, Inc., 1984. Pp. xxi, 595. Index. \$40.

This is the fourth volume of Professor Friedlander's comprehensive survey of documentary material relating to terrorism. Those familiar with

the earlier volumes need no lengthy review of the value and current importance of this work. The interaction of the instruments—the law and international agreements—and the sanctioning and enforcement measures for constraining terrorism and organizations harboring terrorists in their ranks are now abundantly clear. As the documents in this series indicate, terrorism at the level of criminal activity is troublesome enough, but the growing expectation of rising levels of violence carries in its train the expectation that terrorism will come to affect public order itself. Unless vigorously countered, there will be a tendency for terrorism, under more and more circumstances, to be seen as permissible.

Friedlander's documents and brief comments provide ample indication that a trend toward justifying certain types of terrorism is developing, though masked under a variety of forms. The earlier volumes in this series show how violence comes to be accepted as the price of change. We speak of "wars of liberation," or "freedom fighters." We assert the right to pursue self-determination through violence when it is directed against racial, alien or colonial regimes. The notion of "peaceful coexistence" may actually shelter and legitimate the Soviet Union's choices in the struggles for self-determination and no others. From this and the earlier volumes, we gain some insights into how the once familiar—once anathematized—notions of anarchism, syndicalism and Bolshevism each became coherently argued frameworks for the justification of terror for certain ends.

Volume 4 contains documentation from the Department of State assessing the patterns that have now begun to appear in the acts of terrorists, and in the organizational means that are being developed to invoke terrorism as policy. A number of UN General Assembly resolutions are included, specifically addressing acts that might be conducted against diplomats or nuclear weapons facilities. The aircraft incidents are covered by other instruments included in the volume. The *Iranian Hostages* case that was heard in the International Court of Justice and four cases from the United States federal courts afford useful samplings of judicial opinion. The concluding documents are from the European institutions, with four from the Council of Europe on cooperation and extradition, together with the Inter-American Convention on Extradition, signed at Caracas in February 1981, and a new U.S. extradition treaty with Sweden.

HARRY H. ALMOND, JR.  
*National Defense University*

*Die Auslieferungsausnahme bei politischen Delikten: Normative Grenzen, Anwendung in der Praxis und Versuch einer Neuformulierung.* By Torsten Stein. Berlin, Heidelberg, New York, Tokyo: Springer-Verlag, 1983. Pp. xii, 401. English summary. Index. DM 116; \$50.

In an age of sporadic yet persistent international terrorism, extradition has assumed new importance. And within that complicated subject matter,

no problem has created a greater challenge than the delimitation of the political offense exception to the extradition obligation.

Chapter 1 of this work lays the foundation for a critical analysis of the political offense exception by first tracing the historical background of the extradition concept itself. The author then presents in chapter 2 the almost paradoxical development of the political offense concept, which originally constituted one of the strong motivations for establishing a reciprocal extradition system. Only with the tide of political reform, increased concern with individual rights and freedom, and the spread of democratic systems did the "political offense" concept turn into an exception to rather than the norm for an extradition obligation.

Chapter 3 then focuses on the scope of the political offense exception as reflected in the text of numerous multilateral conventions and bilateral treaties. This textual focus demonstrates the problematical aspects of the political offense exception which are essentially definitional in nature. The expansion of the exception from originally covering just "purely" political offenses to the contemporary inclusion of "related" or "relative" political offenses, e.g., offenses such as an assassination that is alleged to be politically motivated, has not only presented challenges to treaty negotiators and legislators, but has given rise to a substantial body of judicial pronouncements and interpretations concerned with the scope of the exception. These pronouncements and interpretations are the object of the author's examination in chapter 4, which presents a summary of some 150 cases litigated before national tribunals.

This examination of treaty provisions and litigated cases leads the author to conclude that, subject to some exceptions, there is a considerable lack of consensus about a consistent application of the political offense exception to extradition. The lack of consistency in the litigated cases is the result, in the author's view, of judicial focus on the "objective and subjective elements of the offense rather than on the motives behind the exception" (p. 380). That is, the definitional problem of what constitutes a "political offense" justifying a refusal to extradite is the consequence of a failure to recognize two different motivations underlying the concept of the political offense exception.

This conclusion leads the author to propose in the fifth and final chapter a new formulation for the political offense exception that should result in its consistent application concomitant with the achievement of its underlying goals. His proposal advocates the express recognition that the political offense exception to extradition serves two distinct goals: humanitarian and political. Thus, he urges utilization of treaty language to achieve a broadened humanitarian scope to the exception, so that "extradition shall not be granted if the requested state has substantial grounds for believing that the fugitive, if returned, would risk being punished or prosecuted on account of his race, religion, nationality or political opinion" (p. 380). As a separate and independent ground for refusing extradition, the author advocates a treaty clause designed to give cognizance to the "politically motivated unwillingness of States to become involved in some other State's [political] problems" (p. 380). His proposed treaty language

would allow refusal of an extradition request on the basis of the national interests of the requested state.

The book is a valuable and interesting addition to the literature of extradition. The descriptions of the historical evolution of extradition and the political offense exception form a solid basis for the ensuing, more innovative parts of the work. Especially noteworthy is the study of litigated cases in national courts, since some of them are unpublished cases. The proposed reformulation of the political offense exception in bifurcated form represents a praiseworthy attempt to solve the problem of its inconsistent application through a clearly stated recognition of the fact that extradition policy involves more than one objective.

DON BERGER

*University of the Pacific  
McGeorge School of Law*

*Obychnoe Oruzhie: Mezhdunarodnoe Pravo* (Conventional Weapons and International Law). By I. P. Blishchenko. Moscow: Mezhdunarodnye Otnosheniia, 1984. Pp. 216. 1 ruble, 20 kopeks.

Laying the blame for the arms race in conventional weapons at the door of NATO and the United States, I. P. Blishchenko, a prominent legal adviser in the Soviet Ministry of Foreign Affairs, argues that even these militant forces are today having to bow to mass pressure for disarmament and development of "humanitarian" law. As is customary in Soviet texts, Blishchenko closes his eyes to what the West sees as provocation for the arms race from the socialist camp. The monograph focuses on the West, documenting in detail proposals made over the years by Soviet diplomats to disarm, and their rejection. Evidently, Soviet jurists cannot bring themselves to accept Western arguments that Western rearmament after World War II was stimulated by fear of Soviet expansion as manifested not only in Europe but also in the Third World, and has been sustained by some Western statesmen who fear that a Soviet agent is concealed behind every reverse for Western diplomacy.

None of this message (that the West is the evil imperialist) is new in Soviet texts, but the monograph is arresting for its expansion of a thesis first made public by Blishchenko at the Annual Meeting of the Soviet Society of International Law in the early 1970s: that Western governments are no longer free to develop positions in international law without regard to the opinion of their populations. Evidently impressed by the impact of television on public opinion during the Vietnam War, Blishchenko was one of the first Soviet jurists to identify Western society as a complex interplay of domestic social forces, rather than as a monolithic imperialist-oriented mass of people.

In this monograph, Blishchenko argues that the fragmentation of popular Western views on warfare has accelerated since World War II as the "correlation of forces" between East and West changed with the

acceptance of socialist thought and structures beyond Eastern frontiers. The public, as the author sees it, demanded limitations on the use of conventional arms in warfare. There was pressure for acceptance of the principles not only that disarmament must be made compulsory, but also that warfare must be "humanized." The major part of the volume is thus devoted to what used to be called "the laws of war," but what Blishchenko and some conventions have called "humanitarian law," since warfare has now been outlawed as an instrument of foreign policy. Blishchenko's exposition of humanitarian law is thorough, emphasizing the development of rules within the last decade, but not to the exclusion of those of far older origins in the Hague Conventions of the turn of the 20th century. Much of the evolution is explained as a response to technical progress in weapons construction, which threatens destruction of the masses. Thus, humanitarian law is seen to include not only the Hague and Geneva rules on warfare, but also those protecting citizens generally in peacetime, now called "human rights law," those relating to prohibition of the use of certain kinds of weapons and, finally, the duty to disarm. Blishchenko argues against those who say that in view of the complexity of contemporary armaments and the impossibility of keeping abreast of technological change, states should rely on the rules of customary law, rather than on ever-amended conventions to humanize warfare. In keeping with the Soviet traditional preference for treaties as a source of law, he prefers to continue the attempt to formulate conventions and to see to their general acceptance.

At this point, Blishchenko departs from traditional Soviet views on judicial decisions as not being a source of law. He argues that judicial decisions "exert influence on the development of contemporary international law confirming or indicating the absence or presence of one or another international legal norm" (p. 77). As an example of such influence, he uses the development of the judicially created Nuremberg principles into a resolution of the UN General Assembly in 1946, which then was formulated as a "code" by the International Law Commission.

Blishchenko's basic thesis, that public opinion today restrains governments and enforces the international law norms—whether of customary or conventional origin—needs an addendum to be valid, namely, the public must be informed. History is proving in the case of Iran that when information is not widely disseminated by forces having the power to be critical of the government's refusal to compromise, there can be no effective public restraint. Questions have been raised as to whether the Soviet public is generally informed of the manner of conduct of the warfare in Afghanistan. One can agree that pressure for the recognition of humanitarian law has been enhanced greatly since World War II, but governments in some instances still control the airwaves and this factor serves to limit the impact of public indignation at violations of law.

JOHN N. HAZARD  
*Board of Editors*



*The International Trade in Art.* By Paul M. Bator. Chicago and London: The University of Chicago Press, 1983. Pp. vii, 108. \$16, cloth; \$6.95, paper.

This impressive volume is only one of Paul Bator's important contributions to the international law of art.

In the late sixties, the world awoke to the fact that the great Mayan stone carvings of Mexico and Central America were disappearing, victim to the rise in international appreciation and price of these extraordinary works. Their preservation was beyond the competence of any one nation; the burgeoning taste in the United States (and Europe) for the relics of long-dead civilizations was as responsible as the circumstances in the region itself. By the same token, the values at stake were also universal; as Professor Bator explains, the interest in preserving and enhancing awareness of any corpus of artistic creativity is by no means limited to its country of origin.

The American Society of International Law responded to the crisis with a panel on the international movement of national art treasures. Bator was persuaded to enlist as its reporter. He was central to the panel's deliberations. Its efforts contributed to the 1970 treaty with Mexico insuring the cooperation of the U.S. Government in the repatriation of any Mexican cultural property that found its way illegally from Mexico to this country, and, even more particularly, to the 1972 legislation banning the importation into the United States of any monumental pre-Columbian sculptures or frescoes wrongfully exported from their country of origin.

Bator also served as a member of the U.S. delegation to the UNESCO Special Committee, which negotiated the UNESCO Convention on Cultural Property. He played a leading role in turning back the original secretariat draft of the Convention, which would have required the United States to prohibit the import of any cultural property unless accompanied by a valid export certificate.

This study pulls together the considerable wisdom that these experiences inspired. It ranges far beyond the pre-Columbian art crisis that was the origin of his interest in the field. Bator includes a comprehensive analysis of the legal regimes of the major art-importing and -exporting nations. He surveys the use of the courts and the recent criminal convictions of traffickers in stolen art. And he has suggestions for the future. Particularly important would be the delegation of authority to the executive branch to implement Article 9 of the UNESCO Convention with a concerted international response to future crises of pillage of archaeological treasures.

WILLIAM D. ROGERS  
*Of the District of Columbia Bar*

*Doing Business with the International Development Organizations in Washington, D.C.* By Maurice Wolf and Elting Arnold. Washington: Tax Management Inc., 1982. \$40.

Directed at businessmen, consultants, bankers and lawyers who wish to provide financing or goods and services in conjunction with such organizations, this portfolio discusses how the World Bank, the International Development Association, the International Finance Corporation and the Inter-American Development Bank (IDB) function. Described by the authors as a "nuts and bolts" approach for working with these organizations, it is a good starting point for anyone looking to do business with or to make investments in developing countries.

The portfolio presents a brief history of each organization's inception and a fairly detailed discussion of how that organization develops and approves projects for member countries. The procurement regulations of each organization are also discussed in detail, with some of the relevant documents included as "Worksheets" at the end of the portfolio. There are also short sections on sources of information and certain legal aspects of dealing with these organizations.

From the detailed analysis the reader gains particular insights into procurement procedures. Such problems as eligibility, nationality requirements, margins of preference, protests, disputes and use of cross-default clauses are presented briefly but succinctly. Through a system of comments, helpful hints are presented on items such as the importance of language capabilities, joint ventures with local firms and learning early of possible business or financing opportunities.

However, the title of this portfolio is misleading—it is not about doing business *with* the international development institutions so much as it is about doing business with developing countries on projects funded by these organizations. Most business opportunities are *via* contracts with a borrowing country, requiring knowledge of that country, of its laws and regulations and special procurement requirements in addition to those of the international organization. As a result, the entrepreneur should visit the country and make the acquaintance of the borrower's officials in charge of the particular project. Most important, though not emphasized enough by the authors, is the need to consult not only with one's own legal counsel, but with local counsel as well.

The portfolio is somewhat uneven in its presentation of information about the different institutions. For example, the authors discuss payment terms, risk of exchange and direct payment by the World Bank, but do not discuss similar items under the IDB. A more parallel structure in handling these two institutions would be helpful. In addition, a chart comparing the structure, approval practices and procurement procedures of all these institutions at a glance would be a useful addition.

In general, however, this portfolio is useful if only because it illustrates that doing business on projects financed by these organizations is a complicated process and requires knowledge of a large number of rules, regulations and procedures.

ANNE M. WILLIAMS

*Slovar Mezhdunarodnogo Prava* (Dictionary of International Law). Edited by B. M. Klimenko, V. F. Petrovskij and Ju. M. Rybakov. Moscow: "Mezhdunarodnye Otnoshenija," 1982. Pp. 244. 1 ruble, 30 kopecks.

As the editors inform us in the preface, this is the first edition of a Soviet dictionary of international law. Extremely small, in comparison with some Western publications of an encyclopedic character in the same field (cf., e.g., Strupp-Schlochauer, *Woerterbuch des Voelkerrechts*, 3 vols., 1960–1962), and also fairly small when compared with the Polish *Encyclopedia of International Law and International Relations* (1976, 472 pp.), it is the collective work of a team of 52 (!) people. It contains some 800 short entries plus a list of Latin terms and maxims in Russian translation. Individual contributions are not even initialed, so one does not know who is responsible for what—not a good practice.

The "ideological positions" of the publication are set forth in a few entries, especially on "The Doctrine of International Law," "The Soviet Doctrine of International Law," "Proletarian Internationalism, Principle of" and "Socialist Internationalism, Principle of."

The first of these informs us that "[t]he existence and the sharp struggle of the two incompatible ideologies on the international arena determine the existence and the sharp struggle of the socialist and the bourgeois doctrines of international law." The leading position is, naturally, taken by the socialist doctrine.

For the bourgeois doctrine [on the other hand], the general reactionary line of the rejection of the progressive democratic principles of international law, the justification of the aggressive policy of imperialist states, their interference in the internal and external affairs of other nations, subscribing to nihilistic positions perverting international law, are characteristic.

Only after that is there mention of the fact that in the bourgeois doctrine there are works and positions, albeit only by "individual scholars," which have a certain positive meaning.

In conclusion, there is a battle cry: "The interests of the struggle for a further strengthening of the world socialist system and international peace, and the securing of peaceful coexistence and defusing of international tension, require a further intensification of the struggle with the reactionary bourgeois international-legal theories."

Lack of space prevents me from going into what the *Dictionary* has to say on the "principles of proletarian and socialist internationalism," treated as a sort of *lex specialis* vis-à-vis the "general democratic principles" of international law, and elaborating on their clearly destabilizing effect on modern international relations. What was said on those "principles" in my review of the East German *Voelkerrecht. Lehrbuch*, applies also in this case.<sup>1</sup>

Here one should only add that under the heading "Proletarian Inter-

<sup>1</sup> Cf. 78 AJIL 512 (1984).

nationalism, Principle of," after stating that relations between socialist states allegedly presuppose "the possibility and need" of the application of a number of "general-democratic principles" such as sovereignty, sovereign rights and noninterference (there is no mention of the "new socialist content" of those principles), it is maintained that "excluded is the possibility and the need of the application of the principle of peaceful coexistence and the principle of nonaggression, intended to regulate relations among such states where antagonistic contradictions may exist."

In a few entries, the trend towards a "dialectical-opportunistic" approach is just intolerable. Thus, under "Partisans," one reads: "Persons who voluntarily fight for the freedom and independence of their country within organized armed guerrilla forces on territory occupied by the enemy (controlled by a reactionary regime)." Needless to say, according to such a position, guerrillas in Afghanistan or Nicaragua, fighting against a "progressive" regime, do not enjoy protection under the international law of war, and should, rather, be treated as members of criminal gangs. Guerrillas in El Salvador, on the other hand, should enjoy such protection.

Historical facts are twisted according to the general Party line. Thus, under "League of Nations," we read about

such a shameful fact in the history of the bankrupt League as the decision of the Council in December 1939 on the exclusion of the USSR from the League—the only state in that period courageously and persistently struggling for the prevention of war, for the bridling of the aggressors.

Soviet aggression against Poland in September 1939, and against Finland in November of the same year, is conveniently "forgotten," as is the close cooperation between the USSR and Nazi Germany until 1941.

A few shorter critical points should be noted. On page 5, the Scandinavian Airlines System (SAS) is mentioned as an example of a Western international air company "created in recent times." In reality, SAS was established in 1946. On page 17, it says that visas are affixed on passports, but the fact that the USSR, for reasons one may only guess, has a totally different practice of issuing separate "carnets," not leaving any trace in the applicant's travel document, is not mentioned. On page 64, one reads that the International Law Commission is composed of 35 members—instead of 34 (GA Res. 36/39 (1981)). On page 68, one reads that the Human Rights Committee holds two sessions a year. In practice, there have been, since 1978, three. On page 99, the IBRD is accused of being "one of the instruments of the imperialistic states" and of granting loans on "usurious" conditions.<sup>2</sup> It may be noted that, in the spring of 1985, the Warsaw weekly *Polityka* (May 11, 1985, at 2) carried the news that Hungary had joined the International Finance Corporation and the International Development Association, but refrained from comment.

Finally, in the Latin-Russian dictionary of some nine pages, one finds translations, e.g., of *gratis*, but looks in vain, e.g., for *erga omnes* or *si omnes*, *jus dispositivum* (while *jus cogens* is there) or *opinio juris sive necessitatis*.

<sup>2</sup> Concerning the doubtful validity of the Soviet allegations in this field, cf., e.g., my review in 77 AJIL 713 (1983), *in fine*.

One feels depressed on noting that *casus foederis* is explained as "a situation falling under the provision of a treaty" (any treaty?!); and that the Latin word for "faith" is given as *fidem* (with an "m" at the end!).

The conclusions of this short review are self-evident.

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*Selected Articles from Chinese Yearbook of International Law*. Edited by the Chinese Society of International Law. Beijing: China Translation & Publishing Corporation, 1983. Pp. vi, 308. \$5.90.

For a long time, international law was grossly neglected in the People's Republic of China. The official attitude toward it was characterized by a mixture of revolutionary contempt and a sincere belief in its ineffectuality. As an academic discipline, international law was assigned a role of an accessory to the Marxist-Leninist theory of international relations. During the Cultural Revolution there was no study of international law to speak of.<sup>1</sup> The change came about when China was faced with the challenge of its new international status in the late 1970s. To meet the challenge, the Government decided to resuscitate some of the institutions that are vital for international intercourse; international law happened to be one of them.

The Chinese Society of International Law, established in 1980 as a result of this policy change, is to be congratulated for having arranged this collection, thus making the first fruits of its activities accessible to an extended audience. The *Chinese Yearbook of International Law*, from which the articles were translated, first appeared in 1982 and has been the only periodical in China devoted exclusively to international law.

The collection under review includes an introduction, nine essays, one book review and a report on the Chinese Society; the editors also appended texts of several laws and regulations, in English translation, adopted in China in recent years. Incidentally, the enactments reproduced in the appendix have already been published in the West in more than one edition. For this reason, the reader would have benefited had the space been devoted to more essays.

It remains to be seen whether the *Yearbook* inaugurates the "spring in [the] study of international law when hundreds of flowers will blossom," as envisioned by Huan Xiang, President of the Chinese Society of International Law and Vice President of the Chinese Academy of Sciences, in the introduction to the volume. What does come forth, however, is a richness of implication and a freshness of ideas that characterize most of the articles.

The value of the volume is enhanced further by the fact that the articles were written by prominent Chinese lawyers, many of whom are known and esteemed by their colleagues in other countries.

<sup>1</sup> Cf. Wang, *Teaching and Research of International Law in Present Day China*, 22 COLUM. J. TRANSNAT'L L. 77 (1983).

The lead article, significantly entitled *The Third World and International Law*, was contributed by Professor Wang Tieya of Beijing University. The writer attributes almost all achievement in international law since World War II to the rise of newly independent nations, the growth of international organizations, the changing structure of economic relations and the advance in science and technology. His espousal of the concept of an international law responsive to a changing social and political environment has a familiar ring to those acquainted with the claims made by socialist and nonaligned countries in the United Nations on such occasions as the drafting of the UN Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States<sup>2</sup> or the adoption of the Charter of Economic Rights and Duties of States.<sup>3</sup> Unlike some other discourses on this subject, which contain sweeping assertions about the emergence of new legal principles, the article diligently searches for evidence to support the author's thesis and tends to rely on criteria of reason and acceptability.

A complementary essay, written by Professor Li Haopei, also of Beijing University, contains a full discussion of *jus cogens* in international law. It deplores the failure of the Vienna Convention on the Law of Treaties<sup>4</sup> to give a precise definition of what constitutes a peremptory norm of international law from which no derogation is permitted. No less critical is the essay on contemporary legal positivism, which is reproached for harboring views that ignore objective reality and felt needs. These would include the theory affirming coordination of the wills of states as the sole basis for international law. (As is well known, this theory has been espoused mainly by the Soviet doctrine of international law.) According to the author, it is appropriate to recognize the "general principles of law" as an independent source of law and perhaps confer their definition on the UN General Assembly.

The law of outer space is the theme of two essays. The author of one of them is Ni Zhengyu, former legal adviser to the Chinese Foreign Ministry and now a judge of the International Court of Justice,<sup>5</sup> who represented China on the UN Committee on Outer Space. His article offers a well-balanced assessment of significant achievements in this new area of international law, with appropriate credit given to the United Nations. Another article, written by He Qizhi, discusses the definition and delimitation of outer space.

Since it decided to expand economic ties with the outside world and open some of its industries to foreign investment, China has promulgated laws and concluded treaties establishing a viable legal framework for international commerce, investment and transfer of technology. Two articles in the collection address some of the underlying legal issues arising

<sup>2</sup> GA Res. 2625, 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970).

<sup>3</sup> GA Res. 3281, 29 UN GAOR Supp. (No. 31) at 50, UN Doc. A/9631 (1974).

<sup>4</sup> UNTS Registration No. 18,232, UN Doc. A/CONF.39/27, at 289 (1969).

<sup>5</sup> The American reader will be interested to know that Dr. Li received a law degree from Stanford University in 1929.

from the new policy and its implementation. They provide examples of the Chinese ability to reconcile adherence to principle with a pragmatic response to economic necessity. The first of the two articles, contributed by Professor Wang Xuan of the Beijing Institute of Political Science and Law, deals with permanent sovereignty over natural resources. Predictably, it construes the principle in the light of the UN resolutions developing the concept of a "New International Economic Order"; however, it also stresses the need for the amicable solution of disputes that may arise between a foreign investor, or his government, and the host country over the latter's actions taken in exercise of permanent sovereignty. The second of the essays, written by Professor Yao Meizhen of Wuhan University, examines the ways in which various countries, both capital-exporting and -importing, regulate and protect international investments. While recognizing that investment guarantees are indispensable and have a firm place among the legal tools promoting economic cooperation, the author cautions against taking such guarantees for granted; capital-exporting countries should not forget that such protection is determined "by the course of events" and that the host country has the right to impose restrictions on foreign investment, whenever it finds its interests require such action.

Sharp criticism is directed at U.S. policy in an article by Zhang Hongzeng, dealing with the Taiwan problem. The author contends that the Taiwan Relations Act passed by the U.S. Congress in 1979 violates Chinese sovereignty and is incompatible with the U.S.-Chinese Communiqué on the Establishment of Diplomatic Relations.<sup>6</sup> He warns that, unless the United States implements the communiqué, "the prospect for Sino-U.S. relations will be gloomy."

Sheng Yu, Deputy Director of the Institute of Law of the Chinese Academy of Sciences, and Wang Keju of the same institute, discuss in separate articles the principles that China has applied in regulating Chinese nationality. They make interesting comments about the new legislation regarding Chinese nationality, promulgated in 1980, which, among other things, rejects dual nationality for the Chinese resident overseas. Evidently, the purpose of the new legislation is to reassure Asian countries with sizable Chinese minorities that China does not intend to use the issue of nationality to interfere with their domestic affairs. The new law states categorically that persons who have voluntarily acquired the nationality of the countries where they reside, do not have Chinese nationality. Overseas Chinese who have not acquired the nationality of the country of residence may claim the right of diplomatic protection by the Chinese Government; however, they still have a duty to abide by the laws of the country of residence and respect its habits and customs. There are provisions in the new law that enable those who decide to return and settle in China to regain or acquire Chinese nationality.

Perhaps one of the most interesting contributions is a book review prepared by Professor Chen Tiqiang of Beijing University. It contains an

<sup>6</sup> 79 DEP'T ST. BULL. 25 (1979), *reprinted in* 18 ILM 274 (1979).

excellent discussion of the late Professor Zhou Gengsheng's treatise on international law, which the reviewer says "is the first valuable writing of this kind published in New China." The book was completed in 1969 but had no hope of appearing in print during the Cultural Revolution. Professor Zhou, who died in 1971 at the age of 82, had taught international law at Chinese universities over a stretch of several decades and had written many important works. In the reviewed book, which was published posthumously in 1976 and again in a new edition in 1982, Zhou reportedly surveys the development of international law, its theory and application, and the Chinese contribution. The reviewer emphasizes the significance of the work and the wealth of ideas it contains, and does so with unconcealed admiration for the author and his views. Nevertheless, he ventures critical observations on several points. For example, he points out that Zhou, apparently confused by inconsistent Soviet use of the Marxist notion of the socialist state as a "state of a historically new type," conceded that the emergence of People's China may have raised the question of succession to international rights and obligations of pre-1949 China. Not so, says the reviewer, and adds that from the perspective of international law, the Chinese state has not changed and no issue of its succession to international rights and duties arises. Adoption of the theory of change of state is not required in order to justify Chinese abrogation of unequal treaties; the latter was a revolutionary act encompassed by existing international law. Polemics with Soviet doctrinal influence constitute the backbone of other critical comments.

These and other critical references to Soviet views elsewhere in the volume show that some important features of the Soviet-inspired doctrine that molded Chinese attitudes toward international law after the 1949 revolution have not secured a permanent place in Chinese jurisprudence. Nor does anything in Chinese writing suggest that China adheres to the doctrine of socialist internationalism, which replaces general international law with a different set of rules applicable to relations between socialist countries. On the contrary, it seems that China supports the trend that clearly favors universalism and rejects dual standards of international behavior.

Yet there are some theoretical conceptions and doctrinal approaches common to both China and the USSR. China's outlook, like that of the Soviet Union, is determined by Marxist ideology and socialist principles. Exercise of sovereignty remains the most important sociological context in which both the Soviet and the Chinese conceptions of international law operate. And the lukewarm attitude toward international remedial procedures, stemming from continued distrust of institutional enforcement in general, constitutes another link.

The volume is not supposed to be a survey of the whole panorama of international law. It focuses on several topics of current interest to China. Nonetheless, the writings assembled reveal a good many hitherto unknown or little-known facts about Chinese theory and practice of international law. For this reason, the volume affords an indispensable source of



information for anyone interested in the study of Chinese approaches to international law.

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*Documents juridiques internationaux*. Edited by Francis Rigaldies and Daniel Turp. Published under the auspices of the Société québécoise de droit international. Cowansville, Quebec: Les Editions Yvon Blais Inc. Periodical publication started in 1982. Currently issued three times a year.

*Australian International Law News*. Edited by James Crawford and David Flint. Published under the auspices of the International Law Association (Australian Branch). Broadway, New South Wales: New South Wales Institute of Technology School of Law. Periodical publication started in 1984.

These two publications have joined the ranks of other international law reviews and journals that provide the international legal community with primary source materials. *Documents juridiques internationaux* reproduces the French text of documents with headnotes that give some background information. *Australian International Law News* carries a variety of information that includes papers delivered at seminars and conferences, notes on current issues including the reproduction of documents, case notes, Australian practice, conferences and events, book reviews and lists of publications.

The primary objective of *Documents juridiques internationaux (DJI)* is to provide the French-speaking international community with the French texts of interesting international legal documents. These documents are grouped under four headings: (1) acts of international conferences and organizations; (2) international agreements; (3) international judicial acts; and (4) unilateral acts of states, primarily national legislation and national court decisions concerning both public and private international law. Priority is given to documents of French-speaking countries. On occasion, French translations are made if the document is considered noteworthy.

*DJI* cannot be considered a substitute for the French documentation carried in the *Journal du Droit International* (Clunet), which includes multilateral agreements carried in the French *Journal Officiel*, legislation and regulations promulgated in France, and documents from the European Communities, as well as documents not officially published in France. Nor should one expect to find that *DJI* includes documents reproduced in the *Revue Générale de Droit International Public*, which concentrates on bilateral agreements of France and legislation and regulations of France concerning public international law issues; or the documents carried in the *Revue Critique de Droit International Privé*, together with its listing of treaties to

which France is a party (with citations to the texts in the *Journal Officiel*), its listing of laws, decrees and official acts of France (with citations to the texts in the *Journal Officiel*), and those texts reprinted under the heading "diverse information," which can include such items as the Belgian Nationality Code, statements of government officials and reservations to Hague Conventions. *DJI's* contribution to French documentation in the field of international law and relations is making available the texts of important current documents from international organizations and conferences, multilateral treaties and Canadian legislation and court decisions.

The *Australian International Law News* has a wealth of information on current issues, much of which might be termed state practice. In each issue the texts of a number of documents are reproduced or extracted. The practice of Australia is surveyed through documentation in accordance with the classification adopted in Jonathan Brown's *Australian Practice in International Law, 1978-1980*, and case notes cover litigation in Australia, France, the United Kingdom and the United States.

Both of these publications provide the researcher with unique primary source materials. They would be more useful, however, if all the materials were classified, grouped and/or indexed systematically to facilitate retrieval and interpretation. The task of making the law more readily accessible faces all publishers of international legal materials. The systematic classification of primary source materials in the field of international law and relations is often neglected, and, consequently, new trends and important contributions to the development of the law may go unnoticed. The American Society of International Law has recognized this need and is seeking to address the consequent problems associated with the development of a classification system. Through the ASIL's "international law information system" project, such a classification system will be applied to the Society's publication, *International Legal Materials*. As progress is made, other publications, such as *Documents juridiques internationaux* and the *Australian International Law News*, might be encouraged to apply a similar approach to their own reporting of documents.

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*South African Yearbook of International Law*. Volume 7, 1981 and Volume 8, 1982. Pretoria: The VerLoren van Themaat Centre for International Law, University of South Africa, 1983. Vol. 7: pp. xiii, 227. Index. Vol. 8: pp. xii, 306. Index. R18,00/vol.

The latest volumes of the *South African Yearbook of International Law* follow the same pattern as in previous years. Two articles in each volume treat general international law issues. Volume 7 includes an interesting article on the Soviet conception of guerrilla war and one on international law sanctions that discusses the Soviet involvement in Afghanistan. Volume

8 contains a study of the World Court's response to the *Nuclear Tests* cases and a review of the German Constitutional Court's consideration of European Community law. But the emphasis is primarily on official South African views of international issues and the myriad of technical legal issues created by the efforts of the South African Government to avoid international legal requirements to end colonialism and apartheid. Discussions such as *Does a Second Generation Black Qualify for Leasehold in South African Black Urban Areas?* may fascinate the political and legal elite of South Africa, but most U.S. scholars and practitioners might prefer to read a Beckett play.

Members of the legal and academic communities with a professional interest in South Africa will continue to find useful material on South African international legal and organizational activities, recent judicial decisions of both domestic and foreign courts, and UN actions related to South Africa. These books also serve as an excellent reminder of the stark reality of the South African Government's treatment of nonwhite people subject to its rule, and the need for continued international challenges to its legitimacy.

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*Foreign Relations of the United States, 1952-1954, Volume I: General: Economic and Political Matters.* Part 1, Dept. of State Pub. 9366. Part 2, Dept. of State Pub. 9367. Washington: U.S. Govt. Printing Office, 1983. Pp. xxi, 1887. Index in part 2.

This is a comprehensive compilation of documents pertaining to important general economic and selected political matters. It bridges the last year of the Truman administration and the first 2 years of the Eisenhower administration. Although it focuses largely on general policy problems, it also deals with a number of concrete issues. While such major developments as the Korean War, the negotiation of the Manila Pact (Southeast Asia Collective Defense Treaty, 1954) and bilateral mutual defense treaties with China/Taiwan, Japan, Korea and the Philippines, and Cold War discord with Moscow and Beijing (Peking) are treated in other *Foreign Relations* volumes, this compendium contains documentation on such matters as the challenging attack by Senator Joseph R. McCarthy on the Department of State and the congressional investigation of the federal employees loyalty program, the devisement of immigration, maritime and Antarctic jurisdiction policies, and the "Bricker Amendment" proposals to modify the treaty and executive agreement process under the Constitution. Much of the content of this anthology is unique to the *Foreign Relations* series because it concerns internal policy formulation rather than negotiations with foreign governments or deliberations within international organizations.

The volume consists of two parts. The first (pages 1-816) presents documentation on the foreign policy aspects of the administrative transition in the White House and Department of State from the Truman to the Eisenhower administrations (covering the 10 weeks from early November 1952 to mid-January 1953), general U.S. economic policy considerations and a number of specific policy questions. Among the administrative transition documents are briefing papers for the President-elect, memorandums by the Secretary and other members of the Department of State, records of joint meetings between Truman and Eisenhower and Secretaries Acheson and Dulles, and the like. The segment on general economic policy deals with such matters as interagency staff review of policy, the report of the commission headed by Clarence B. Randall and the creation of a top-level coordinating Council on Foreign Economic Policy.

The bulk of part 1 (pages 114-816) is devoted to five concrete functional economic policy areas. These run the gamut from international trade and commerce (commercial reciprocity, bilateral trade agreements and three sessions under the General Agreement on Tariffs and Trade), foreign investment and economic development (including the operation of the Point Four Program and planning for the establishment of the UN International Development Fund and the International Finance Corporation of the International Bank) and monetary and financial affairs (including relations with the International Bank and the International Monetary Fund) to international transportation and communications (including civil air transport, the activities of the Civil Aeronautics Board, participation in the International Civil Aviation Organization, ocean shipping and telecommunications) and foreign assistance (including the administration of the Mutual Security Program). Documentation contained in these segments includes materials that involve the Commerce and Treasury Departments, the National Advisory Council on International Monetary and Financial Problems, the Export-Import Bank, the Technical Cooperation Administration and other agencies, as well as the Department of State. Reflecting transition from post-World War II Marshall Plan aid to a broader foreign assistance and development program, documents also concern the Mutual Security Agency and the Foreign Operations Administration, successors to the earlier Economic Cooperation Administration.

Part 2 (pages 817-1856) covers seven distinct and unrelated issues. The first two, primarily economic policy matters, include Cold War economic defense policy (such as attempts by the United States to control East-West trade, stockpiling of strategic goods and efforts to protect strategic industries abroad and assure the supply of key commodities essential to Western defense) and U.S. policy regarding the applicability of antitrust legislation to petroleum companies and their functioning as an international cartel—especially the Iranian Petroleum Consortium. Another section is devoted to immigration and migration policy, and provides documentation pertaining to the Brussels Conference on Migration (1951), the Intergovernmental Committee for European Migration, emergency U.S. immigration and refugee relief programs and the controversial Immigration and

Nationality Act of 1952 (called the McCarran-Walter Act, passed by Congress, vetoed by President Truman and then passed over his veto).

The remaining four segments deal with disparate topics. Two of these involve important principles of international law and the other two deal with internal problems. The international legal issues concern the law of the sea and jurisdiction in Antarctica. Policy documents on the first of these pertain to our traditional stand on freedom of the seas, jurisdiction over territorial waters and the continental shelf, and fishery rights, together with the implementation of the International Convention for the Safety of Life at Sea (adopted by the London Conference in 1948, ratified by the United States the following year, but not in force internationally until November 1952), internal rectification of state and federal claims to control navigable waters within state boundaries and UN consideration of action to institutionalize law governing the continental shelf and the conservation of living resources of the sea. The section on Antarctica emphasizes the refinement of U.S. objectives and the formulation of policy respecting plausible U.S. national claims in the Antarctic area in competition with the territorial pretensions of six European and South American countries, and planning U.S. programs and expeditions in Antarctica during the International Geophysical Year (1957-1958).

The foreign relations aspects of the inflammatory congressional loyalty and security investigations (held between 1950 and 1954), especially as they relate to the Department of State, are dealt with at some length. These centered on the McCarthy allegations of Communist infiltration into the Department and the diplomatic service, congressional investigations including the widely publicized "Army-McCarthy Hearings," the reassessment of the Department of State loyalty-security program and the Roy Cohn and George David Schine investigatory excursion to Europe in 1953. This documentation supplements the published congressional and other public records and unofficial analyses of this troublesome situation.

Finally, the "Bricker Amendment" movement—led by Senator John W. Bricker, supplemented by Senators Arthur V. Watkins and William F. Knowland, and moderated by Senator Walter F. George—which produced one of the post-World War II great debates in American foreign relations, sought by constitutional amendment to restrict executive agreement-making authority. Although the matter was widely reported in congressional records, the media and monographic studies, this compendium synthesizes official documentation concerning internal Department of State and inter-agency considerations, exchanges between the Department and the White House, several Cabinet discussions and the apparent willingness of President Eisenhower to accede to a compromise constitutional amendment and Secretary Dulles's forceful opposition to any amendatory change.

Because this anthology emphasizes executive policymaking and domestic problems impinging on the Department of State and the conduct of American foreign relations, the documentation it presents embodies a larger proportion of internal governmental memorandums, reports on Cabinet, National Security Council and other interagency deliberations

and interchanges, and Department of State proposals and commentaries than the exchanges between the United States and foreign governments usually contained in the *Foreign Relations* series. It therefore contributes more to understanding the policymaking than the policy-implementing process.

As is customary, the editors of this compilation supply its users with a good many helpful descriptive, explanatory and cross-referencing notes. Textual content is supplemented by a comprehensive list of official sources—including not only Department of State, other government agency and National Archives files, but also the Truman and Eisenhower presidential library holdings, and the personal papers of the Secretary of State and other officials. A second supplement constitutes a list of nearly 250 acronyms, abbreviations and symbols, with succinct explanations. Because the volume is organized in a small number of relatively lengthy basic sections, the table of contents provides little guidance to specific content. Users of the volume, therefore, will find the carefully structured 29-page, double-columned index of considerable help.

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*The Legal Regime of Foreign Private Investment in the Sudan and Saudi Arabia: A Case Study of Developing Countries.* By Fath El Rahman Abdalla El Sheikh. London and New York: Cambridge University Press, 1984. Pp. 462. Index.

In essence, this work is an examination of legal aspects of foreign private investment in the Sudan, accompanied by a careful survey of the legal dimensions of such investment in the Third World generally. The discussion of these topics is backed by selected references to relevant law in Third World countries other than the Sudan. The book will be particularly useful to two groups of potential readers: those who are interested in facets of the legal regime affecting foreign private investment in the Sudan in the seventies and those who are looking for surveys of the international legal framework and institutions regulating relations between capital-exporting states and the Third World. Indeed, the book could be used as a kind of primer for students of these subjects since it is very well organized and clearly written and contains helpful tables, notes and references. The style is mostly quite scholarly and dispassionate and the research and documentation solid.

Among the topics treated are procedures for setting up foreign investments, obstacles to and incentives for private investment, rules regarding expropriation, current theories regarding the nature of economic development contracts, settlement of investment disputes, problems of conflicts of laws, the treatment of the rights of foreign investors in host country

legal systems, bilateral investment treaties, U.S. and German foreign investment insurance programs, and remedies available to the foreign investor aggrieved by state conduct. The Sudan is used as the primary case study for examination of these topics, but the references to investment issues in other countries are numerous. The example of Saudi Arabia frequently comes up in these comparisons, but the author concedes his lack of expertise in Saudi law, and the discussions of the Saudi system include some questionable generalizations, as do the author's comments about Islamic law in general.

Although the work has been updated by an addendum designed to bring the coverage up to 1983, some aspects of the study have already been superseded by recent developments in the Sudan. The book paints a basically optimistic picture of prospects for foreign investment in the Sudan, including enhanced investment from Arab countries, modernization and streamlining of business laws, and successful collaboration between the Government and Chevron on a critical pipeline project. By 1984, observers of Sudanese development could note a decline in Arab investment in reaction to a deepening economic crisis, the replacement of much Western law in the economic sphere by laws of Islamic derivation and a breakdown in the pipeline project due to Chevron's assessment that local conditions were too unsettled and dangerous—an assessment disputed by the Sudanese Government.

Thus, at the moment, Sudanese developments seem to be leading in directions quite different from those contemplated by the author. All this does not detract from the book's real usefulness, however, since contrasting the assumptions on which both the Government and foreign investors were proceeding until very recently with actual events in the last few years will no doubt prove instructive background for those interested in the question of the degree to which the laws regarding investments described here can provide real protection against the adverse consequences of economic crises and political instability in the Third World.

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## BRIEFER NOTICES

*Recollections of a Pioneering Sovietologist.* By John N. Hazard. (New York, London, Rome: Oceana Publications, Inc., 1984. Pp. xviii, 139. Index. \$20.) Autobiography has attracted a number of comparative lawyers recently, René David being an elegant example, notwithstanding the fact that lawyers as a general rule have cluttered the shelves with some of the most appalling contributions to this genre of literature. The trial lawyers do best—but only vicariously through the antics of their clients. Soviet specialists have done better than most, as the splendid memoirs of Chip Bohlen and George Kennan, amongst others, attest. Undaunted by the general pattern and perhaps stimulated by the latter, John Hazard, now in his 77th year, looks back in these autobiographical notes on how he

became a sovietologist and what a sovietologist of his generation did. The treatment is rather more of a family history than an account of a discipline or intellectual growth. It deals with ancestral precursors, adolescence, college, law school, Moscow student days, Wall Street, marriage and family, government service in lend-lease, secondment to Vice President Henry Wallace during the latter's visit to the USSR, Mongolia and China, a stint at the Nuremberg war crimes trials, and installation and subsequent tenure at Columbia University. Ruminations appear on the place of the Episcopal Church in his life, followed by an epilogue on the retirement years, a bibliography of principal writings and a chronology.

Those who admire Hazard's irrepressible *joie de vivre* will find the volume a pleasurable read, but, as autobiography, disappointing. Hazard is plainly uncomfortable with his subject. The studiously noncommittal style used to excellent advantage in his scholarly writings is here heavy and out of place. He recounts events and records achievements that are often of great consequence for the development of Soviet studies, without conveying any sense of the intellectual or other milieu in which they originated. Years of service to international and comparative legal studies receive the slightest mention—the American Society of International Law a passing reference, for example, and not even an entry in the index. Professional colleagues seem to have become almost nonexistent, and the issues of the day likewise. One can but hope the "lawyer-journalist" who is preparing a more searching assessment (p. viii) will give us an account more worthy of the subject.

W. E. BUTLER

*Harmonization of Laws in the European Communities: Products Liability, Conflict of Laws, and Corporation Law.* Edited by Peter E. Herzog. (Charlottesville: University Press of Virginia, 1983. Pp. xii, 148. Index. \$20.) This brief volume is composed of papers presented at the Fifth Sokol Colloquium of the University of Virginia School of Law. The papers all attempt to clarify the nature of the harmonization process itself while focusing upon the topics of products liability, choice of law in contracts and corporation law.

Harmonization has been much misunderstood. The papers point out that it does not mean unification as such. Article 3(h) of the Rome Treaty calls only for the "approximation of the laws . . . to the extent required for the proper functioning of the common market." The colloquium, then, avoids the major policy issues concerning the future of the Community and concentrates instead on the gradual evolution of approximation.

In narrowing their discussion, the contributors present some valuable insights into such issues as the definition of "defectiveness" in products liability, the concept of *loi de police* in contracts and the European notion of privity in torts. They go on to examine the actual extent of harmonization in their areas and the prospects for progress such as the Convention on the Law Applicable to Contractual Obligations. Perhaps most importantly, all seem to agree that, whatever the future of the Community, the harmonization process has steadily contributed to improving relations and to promoting freer movement of goods and persons between the members.

JOHN R. LACEY  
*Hartford, Connecticut*



*The Fund and China in the International Monetary System.* Edited by A. W. Hooke. (Washington: International Monetary Fund, 1983. Pp. x, 187.) The title gives the impression that this book deals with the role of the People's Republic of China in the IMF. In fact, about the only connection between China and this work is that the colloquium out of which it grew was held in Beijing.

Basically, this publication is a collection of papers given at that meeting by various officials of the IMF on different aspects of the Fund and its operations. It does also include an article by a Chinese economist, Professor Y. Luo; but this piece is limited to describing the current status of the PRC economy. The relationship of that nation to the IMF is not discussed. Professor Luo does mention the importance of South-South cooperation and recognizes that IMF assistance is essential for many debt-burdened Third World nations.

Although the book will do little to enlighten one about China and the IMF, it may be useful for a different purpose. The diverse resources and facilities of the Fund are explained in a clear, simple fashion. Thus, the work could be helpful to readers looking for a quick education on the functioning of this rather arcane institution. Of particular interest to lawyers from developing countries could be the chapters on "Fund Programs for Economic Assistance" (Gutián), "The SDR—An Introduction" (Hood) and "The Role of the Fund in Developing Countries" (Hooke).

BEVERLY MAY CARL  
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Southern Methodist University

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# INTERNATIONAL LEGAL MATERIALS\*

## CONTENTS

VOL. XXIV, No. 2 (March 1985)

	PAGE
LEGISLATION AND REGULATIONS	
Argentina: Draft Code of <i>Private International Law</i>	
Introductory Note .....	269
Private International Law Act .....	272
People's Republic of China:	
Interim Regulations on <i>Technology Transfer</i> .....	292
<i>Patent Law</i> .....	295
Regulations on Implementing the <i>Patent Law</i> .....	302
Yugoslavia: Law on <i>Investment of Resources of Foreign Persons</i> in Domestic Organizations of Associated Labor, as Amended	
Introductory Note .....	315
Investment Law .....	318
JUDICIAL AND SIMILAR PROCEEDINGS	
France:	
Court of Appeal of Rennes Decision in Guinea and SOGUIPECHE v. Atlantic Triton Company ( <i>ICSID Arbitration; Judicial Abstention of National Courts</i> )	
Introductory Note .....	340
Excerpts of Decision .....	341
Court of Appeal of Rouen Decision in Société Européenne d'Etudes et d'Entreprises v. Yugoslavia, et al. ( <i>Recognition of Arbitral Award</i> )	
Introductory Note .....	345
Excerpts of Decision .....	347
World Bank Brief Submitted to Orleans Court with regard to <i>Attachment and Privileges and Immunities</i> .....	354
Court of Cassation Decision in Pabalk Ticaret v. Norsolor ( <i>Enforcement of Arbitral Awards; Lex Mercatoria</i> )	
Introductory Note .....	360
Excerpts of Decision .....	363
International Centre for Settlement of Investment Disputes Arbitral Tribunal: Decision on Request for <i>Provisional Measures</i> in Arbitration between Amco Asia Corporation et al. and Indonesia .....	365
United States: Hanoch Tel-Oren v. Libyan Arab Republic, et al. ( <i>Terrorist Acts; Violation of Law of Nations; Alien Tort Statute; Foreign Sovereign Immunities Act; Lack of Subject Matter Jurisdiction</i> )	
Court of Appeals for the District of Columbia Circuit Decision .....	370
United States Brief Submitted to Supreme Court in Response to Court's Invitation in Reviewing Petition for a Writ of Certiorari .....	427
TREATIES AND AGREEMENTS	
Council of Europe: Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Extending the List of <i>Civil and Political Rights</i>	435

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Inter-American Investment Corporation: Agreement Establishing, for the Purpose of Encouraging <i>Private Enterprises to Supplement Activities of the Inter-American Development Bank</i> .....	438
Third Inter-American Specialized Conference on Private International Law: Conventions and Additional Protocol	
Introductory Note .....	459
Inter-American Convention on <i>Conflict of Laws concerning the Adoption of Minors</i> .....	460
Inter-American Convention on <i>Personality and Capacity of Juridical Persons in Private International Law</i> .....	465
Inter-American Convention on <i>Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments</i> .....	468
Additional Protocol to the Inter-American Convention on the <i>Taking of Evidence Abroad</i> .....	472
United Nations: Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution, on Financing the <i>Monitoring and Evaluation of Air Pollutants in Europe</i> .....	484
OTHER DOCUMENTS	
The <i>United States Withdrawal from UNESCO</i>	
U.S. Letters to the Director-General of UNESCO .....	489
UNESCO Acknowledgment .....	492
UNESCO Director-General's Report on the Consequences of the Withdrawal of a Member State .....	493
UNESCO Executive Board's Decision concerning the Withdrawal .....	528
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS A PARTY	531
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS NOT A PARTY .....	535
NOTICE OF OTHER RECENT DOCUMENTS (not reproduced) .....	536

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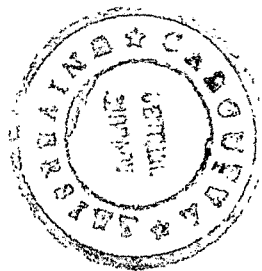
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# AMERICAN JOURNAL OF INTERNATIONAL LAW

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## CONTENTS

	PAGE
<b>Perspectives on the New Law of the Sea</b>	
<b>Progressive Development of International Law and the Package Deal</b>	
<i>Hugo Caminos &amp; Michael R. Molitor</i>	871
<b>Functionalism and the Balance of Interests in the Law of the Sea: Cuba's Role</b>	
<i>Alberto R. Coll</i>	891
<b>The Return of Humpty-Dumpty: Foreign Relations Law after the Chadha Case</b>	
<i>Thomas M. Franck &amp; Clifford A. Bob</i>	912
<b>From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case</b>	
<i>L. H. Legault &amp; Blair Hankey</i>	961
<b>Notes and Comments</b>	
Litigation Implications of the U.S. Withdrawal from the <i>Nicaragua Case</i>	<i>Keith Highet</i> 992
Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The "Salvadoran Incident"	<i>Jerzy Sztucki</i> 1005
In Memoriam: Professor Ted L. Stein (1952-1985)	<i>Jonathan I. Charney</i> 1036
Correspondence	1037
<b>Contemporary Practice of the United States Relating to International Law</b>	<i>Marian Nash Leigh</i> 1044
<b>Judicial Decisions</b>	<i>Monroe Leigh</i> 1054
<b>Current Developments</b>	
The Paris Minimum Standards of Human Rights Norms in a State of Emergency	<i>Richard B. Lillich</i> 1072
<b>Book Reviews and Notes</b>	<i>Edited by Leo Gross</i>
Zoller, Elisabeth. <i>Peacetime Unilateral Remedies: An Analysis of Countermeasures</i> (W. Michael Reisman)	1082
Stone, Julius. <i>Visions of World Order: Between State Power and Human Justice</i> (Benjamin B. Ferencz)	1084
Lazarev, M. I. (ed.). <i>Sovremennoe mezhdunarodnoe morskoe pravo</i> (John N. Hazard)	1087
McWhinney, Edward. <i>United Nations Law Making</i> (Frederic L. Kirgis, Jr.)	1088
Rubin, Seymour J., and Thomas R. Graham (eds.). <i>Managing Trade Relations in the 1980s</i> (Daniel K. Tarullo)	1089
Dupuy, René-Jean (ed.). <i>The Future of International Law in a Multicultural World</i> (Harry H. Almond, Jr.)	1091
Keal, Paul. <i>Unspoken Rules and Superpower Dominance</i> (Francis A. Boyle)	1093
Green, L. C. <i>Essays on the Modern Law of War</i> (Harry H. Almond, Jr.)	1095
Dale, William. <i>The Modern Commonwealth</i> (Alfred P. Rubin)	1097



Dawisha, Adeed, and Karen Dawisha (eds.). <i>The Soviet Union in the Middle East</i> (Charles G. MacDonald)	1099
<i>Foreign State Immunity</i> (H. Scott Fairley)	1100
Usher, John A. <i>European Court Practice</i> (Gerhard Bebr)	1102
<i>States of Emergency: Their Impact on Human Rights</i> (Gaudio M. Grossman)	1104
Buergenthal, Thomas, and Robert E. Norris (eds.). <i>Human Rights: The Inter-American System. Binders I, II and III</i> (Sandra Coliver)	1106
<i>Digest of Strasbourg Case-Law relating to the European Convention on Human Rights</i> . 2 vols. (Hurst Hannum)	1108
Lüke, Gerhard, Georg Röss and Michael R. Will (eds.). <i>Rechtsvergleichung, Europarecht und Staatenintegration</i> (Wesley L. Gould)	1111
Macalister-Smith, Peter. <i>International Humanitarian Assistance</i> (Alfred-Maurice de Zayas)	1113
Degan, Vladimir-Đuro. <i>Međunarodno pravo i međunarodna sigurnost</i> (Vojin Dimitrijević)	1114
Stewart, Stephen M. <i>International Copyright and Neighbouring Rights</i> (Thad W. Simons, Jr.)	1115
Wadegaonkar, Damodar. <i>The Orbit of Space Law</i> (Bruce Hurwitz)	1116
Morgenstern, Felice. <i>International Conflicts of Labour Law</i> (Rolf Birk)	1120
Lammers, J. G. <i>Pollution of International Watercourses</i> (G. E. do Nascimento e Silva)	1123
Bianchi, Paolo, and Giovanni Cordini. <i>Comunità Europea e protezione dell'ambiente</i> (Ida Pavesi)	1125
Theutenberg, Bo Johnson. <i>The Evolution of the Law of the Sea</i> (Donald E. Karl)	1127
Sanders, Pieter (ed.). <i>Yearbook Commercial Arbitration. Volume IX—1984</i> (Gerald Aksen)	1129
Brownlie, Ian (ed.). <i>Basic Documents in International Law</i> (3d ed.) (Emmanuel Didier)	1130
Trindade, Antônio Augusto Cançado. <i>Repertório da Prática Brasileira do Direito Internacional Público</i> . 3 vols. (Edith Brown Weiss)	1131
Uschakow, Alexander. <i>Integration im RGW (COMECON): Dokumente</i> (K. Grzybowski)	1132
<i>Foreign Relations of the United States, 1952–1954, Volume II: National Security Affairs</i> . 2 parts (Elmer Plischke)	1135
<i>Foreign Relations of the United States, 1952–1954, Volume XV: Korea</i> . 2 parts (Elmer Plischke)	1139
<b>Briefer Notices:</b> Elders, Eyffinger, Gellinek, Kwiatkowska and Willems, 1141; Sigler, 1142; Chen, 1142.	
<b>Books Received</b>	1143
<b>International Legal Materials.</b> Contents, Vol. XXIV, No. 3 (May 1985) and No. 4 (July 1985)	1148
<b>Table of Cases</b>	1151
<b>Index</b>	1155

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# PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND THE PACKAGE DEAL

*By Hugo Caminos and Michael R. Molitor\**

## I. INTRODUCTION

For centuries the law of the sea operated efficiently on the basis of customs that had developed through uniform and consistent state practice and that were considered, in most instances, to be obligatory. It was not until the late 19th century that the evolution of the international community suggested the wisdom of codifying the existing and emerging customary norms. Although the early codification efforts were conducted by learned societies<sup>1</sup> established for such purposes, the resulting studies<sup>2</sup> eventually led to several multilateral treaty negotiations,<sup>3</sup> including the Hague Codification Conference of 1930 and the three United Nations Conferences on the Law of the Sea. The fruits of this evolution from the predominance of custom towards universal treaty law are found principally in the Geneva Conventions of 1958<sup>4</sup> and, more recently, in the United Nations Convention on the Law of the Sea of 1982.<sup>5</sup>

Although the 1982 Convention was intended to prevail, as between states parties, over the 1958 Conventions<sup>6</sup> and covers nearly every conceivable use of the oceans and their resources, the relationship between the new Convention and existing and evolving customary rules remains a critical

\* Assistant Secretary for Legal Affairs, Organization of American States; and Associate Law of the Sea Officer in the Office of the Special Representative for the Law of the Sea at the United Nations, respectively. The views expressed below are personal and are not attributable to any institution with which the authors are, or have been, associated.

<sup>1</sup> These research societies were the International Law Association and the Institut de Droit International, both of which were founded in 1873.

<sup>2</sup> See Report of the Third Commission: *Définition et régime de la mer territoriale*, 3 INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE (1894); and INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SEVENTEENTH CONFERENCE HELD AT BRUSSELS (1895).

<sup>3</sup> These studies also influenced the London Naval Conference of 1909 and the 1907 Hague Peace Conference.

<sup>4</sup> The four Geneva Conventions of Apr. 29, 1958 are: Convention on the Territorial Sea and the Contiguous Zone, 15 UST 1606, TIAS No. 5639, 516 UNTS 205; Convention on the High Seas, 13 UST 2312, TIAS No. 5200, 450 UNTS 82; Convention on the Continental Shelf, 15 UST 471, TIAS No. 5578, 499 UNTS 311; and Convention on Fishing and Conservation of Living Resources of the High Seas, 17 UST 138, TIAS No. 5969, 559 UNTS 285.

<sup>5</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. Sales No. E.83.V.5) [hereinafter cited as 1982 Convention].

<sup>6</sup> *Id.*, Article 311(1) states: "This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958."

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*Editorial Note:* For a reply to some positions taken by Dr. Caminos and Mr. Molitor, see the letter from Admiral Bruce Harlow, *infra* at p. 1037.

issue for at least two important reasons. First, the Convention has yet to enter into force<sup>7</sup> so that, in the period between its adoption and entry into force, the rules governing the legal relationship between states, whether signatories or not, continue to be determined on the basis of custom and preexisting international agreements. Furthermore, the lengthy negotiations that produced the 1982 Convention undoubtedly influenced the development of customary norms to the extent that the Convention may reflect such changes.<sup>8</sup> Second, as a small group of major industrial states<sup>9</sup> have decided not to become parties to the 1982 Convention, the relationship between the Convention and existing and emerging customary norms will determine to a large extent the rights and obligations that may be invoked by and against such nonparties. The latter subject will be examined in this article.

The relationship between treaties and custom in the law of the sea is not a new subject;<sup>10</sup> not surprisingly, it has attracted a fair amount of scholarship.<sup>11</sup> The vast majority of the authors who have treated this subject take the position that the 1982 Convention generally codifies existing customary rules and may therefore be invoked by nonparties as a source of rights as well as obligations.<sup>12</sup> These authors have accurately described the means by which nonparties (third states) traditionally exercise rights on the basis of provisions that reflect custom as it is codified in multilateral conventions. As one essay states:

The 1982 Convention may:

1. reinforce traditional customary law of the sea by repeating rules embodied in the 1958 Law of the Sea Conventions;
2. foster new customary law by giving written expression to customary law that has developed since 1958, often in contradiction to the 1958 Conventions; or

<sup>7</sup> *Id.*, Article 308(1) reads: "This Convention shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession." As of July 1, 1985, according to the Office of the Special Representative of the Secretary-General for the Law of the Sea, 20 states had ratified the 1982 Convention.

<sup>8</sup> See text accompanying note 71 *infra*.

<sup>9</sup> Those states include the United States, the United Kingdom and the Federal Republic of Germany.

<sup>10</sup> Most notably, this relationship surfaced in the North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3 (Judgment of Feb. 20). On this subject, see I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 22-24 (2d ed. 1984).

<sup>11</sup> See, e.g., Gamble & Frankowska, *The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning*, 21 SAN DIEGO L. REV. 491 (1984); Howard, *The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 321 (1981); MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 CAL. W. INT'L L.J. 181 (1983); D'Amato, *An Alternative to the Law of the Sea Convention*, 77 AJIL 281 (1983); and Lee, *The Law of the Sea Convention and Third States*, 77 AJIL 541 (1983).

<sup>12</sup> As examples of the prevailing view of authors, note the following comments: "The United Nations Law of the Sea Treaty, despite protestations to the contrary, has codified with almost unanimous international consent, customary law of the sea." MacRae, *supra* note 11, at 221-22. "Most of the general observations of the custom-treaty relationship probably will be applicable to the 1982 Convention." Gamble & Frankowska, *supra* note 11, at 496.

3. direct the development of future customary law of the sea by giving expression to concepts not yet accepted as customary law but which are likely to become part of that law.<sup>13</sup>

Without a doubt, the above enumeration correctly depicts the traditional method of determining the relationship between the 1982 Convention and customary international law.<sup>14</sup> However, the Third United Nations Conference on the Law of the Sea (UNCLOS III) was responsible for the evolution of many precedent-setting rules concerning the negotiation of multilateral conventions. The participating states reached nearly all of their decisions by consensus<sup>15</sup> and, believing that "the problems of ocean space are closely interrelated,"<sup>16</sup> they treated the conference's informal negotiating texts as a provisional package of indivisible constituent compromises; consequently, the traditional rules may not apply to the 1982 Convention. As Judge Jennings has noted:

[The conference was] unprecedented, not only in the number of governments taking part, but also in the vast field of law that [was] its subject matter, presenting a spectrum of tasks ranging from codification and progressive development to the devising of new concepts and even new principles of law. It is this range of different purposes that precipitates correspondingly novel questions about the sources of legal obligation and especially about that delicate relationship and interaction between what we still quaintly call custom and the specific obligations created for parties to a treaty.<sup>17</sup>

In accordance with this observation, this study will examine the evolution of the package deal at UNCLOS III to determine which rules governing the relationship between multilateral conventions and customary international law apply to the 1982 Convention.

## II. THE EVOLUTION OF THE PACKAGE DEAL

To appreciate how the package deal influenced the development of customary rules during the period of the UNCLOS III negotiations (1973-1982), one must have recourse to the origins of the conference. Following the now famous speech made by Ambassador Pardo of Malta before the UN General Assembly in 1967, the General Assembly established in 1968 an

<sup>13</sup> Gamble & Frankowska, *supra* note 11, at 492.

<sup>14</sup> For an excellent discussion of the traditional relationship between treaties and custom, see Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965-66). On the relationship between the broader subject of general international law and the 1982 Convention, see Orrego, *The Law of the Sea Experience and the Corpus of International Law: Effects and Interrelationship*, in 18 LAW OF THE SEA INSTITUTE, PROC. (R. Krueger & S. Riesenfeld eds., forthcoming 1985).

<sup>15</sup> On the role of the consensus procedure at UNCLOS III, see Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 AJIL 324 (1981); and Vignes, *Will the Third Conference on the Law of the Sea Work According to Consensus Rules?*, 69 AJIL 119 (1975).

<sup>16</sup> 1982 Convention, *supra* note 5, Preamble.

<sup>17</sup> Jennings, *The Discipline of International Law*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SEVENTH CONFERENCE HELD AT MADRID 622, 623 (1976) (emphasis added).



*Ad Hoc* Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction.<sup>18</sup> The following year, the General Assembly adopted a resolution which recognized that "the problems relating to the high seas, territorial waters, contiguous zones, the continental shelf, the superjacent waters, and the sea-bed and ocean floor beyond the limits of national jurisdiction are closely linked together."<sup>19</sup> Hence, the idea that the Sea-bed Committee should treat the individual issues as an interrelated package was born.

As a result of identifying the interrelationship between the multitude of law of the sea issues, the Sea-bed Committee agreed to attempt to reach consensus on all decisions, procedural as well as substantive.<sup>20</sup> By 1970, when the General Assembly decided to convene the third conference,<sup>21</sup> the idea of extending the package deal and consensus procedures to the upcoming conference had already taken root. With the adoption of the Rules of Procedure<sup>22</sup> and the appended Gentleman's Agreement<sup>23</sup> at the second session of UNCLOS III (Caracas, 1974), consensus and package deal were well integrated into the negotiating procedures.

Although no decisions of substance were taken at the second session, the report on this session by the United States delegation<sup>24</sup> clearly outlines the origins of the initial Second Committee compromises that would eventually form the basis of the overall package deal:

The idea of a territorial sea of 12 miles and an exclusive economic zone beyond the territorial sea up to a total maximum distance of 200 miles is, at least at this time, the keystone of the compromise solution favored by the majority of the States participating in the Conference, as is apparent from the general debate in the Plenary meetings, and the discussion held in our Committee.

Acceptance of this idea is of course dependent on the satisfactory solution of other issues, especially the issue of passage through straits used for international navigation, the outermost limit of the continental shelf and the actual retention of this concept and, last but not least,

<sup>18</sup> GA Res. 2467A (XXIII) (Dec. 21, 1968).

<sup>19</sup> GA Res. 2574A (XXIV) (Dec. 15, 1969).

<sup>20</sup> See generally Miles, *The Structure and Effects of the Decision Process in the Seabed Committee and the Third United Nations Conference on the Law of the Sea*, 31 INT'L ORG. 159 (1977).

<sup>21</sup> GA Res. 2750C (XXV) (Dec. 17, 1970).

<sup>22</sup> UN Doc. A/CONF.62/30 (1974).

<sup>23</sup> The so-called Gentleman's Agreement was approved by the General Assembly and appended to the Rules of Procedure. *Id.* at 17. The agreement provides:

Bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole and the desirability of adopting a Convention on the Law of the Sea which will secure the widest possible acceptance,

The Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.

<sup>24</sup> For a compilation of the reports from each of the 11 sessions of UNCLOS III, see REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (M. Nordquist & C. Park eds. 1983).

the aspiration of the landlocked countries and of other countries, which, for one reason or another, consider themselves geographically disadvantaged.

There are, in addition, other problems to be studied and solved in connection with this idea, for example, those relating to archipelagos and the regime of islands in general.<sup>25</sup>

Furthermore, the U.S. representative to the second session, Ambassador John R. Stevenson, made clear the United States position on the compromises that would constitute the package deal in a speech on July 11, 1974:

[W]e are prepared to accept, and indeed we would welcome, general agreement on a 12-mile outer limit for the territorial sea and a 200-mile outer limit for the economic zone, *provided it is part of an acceptable comprehensive package* including a satisfactory regime within and beyond the economic zone and provision for unimpeded transit of straits used for international navigation.<sup>26</sup>

Ambassador Stevenson also commented on the conference's general view of the emerging package deal compromises:

The statements to date make clear that in the case of a large number of states whose agreement is critical for an effective, generally acceptable treaty, the growing consensus on the limits of national jurisdiction—i.e., a maximum outer limit of 12 miles for the territorial sea and of 200 miles for the economic zone—is *conditional on a satisfactory overall treaty package*. . . .<sup>27</sup>

The views expressed by Ambassador Stevenson in fact characterized the pattern of negotiation for the remainder of the conference. In the U.S. delegation's report on the third session of the conference (Geneva, 1975), the United States position was again plainly stated:

Negotiation of a balance of rights and duties in the 200-mile economic zone is one of the most important elements of a satisfactory package. . . . A substantial consensus continues on a territorial sea of 12 miles. There appears to be a strong trend in favor of unimpeded passage of straits used for international navigation as part of a Committee II package.<sup>28</sup>

Finally, in the report summarizing the activities of the resumed ninth session (Geneva, 1980), the U.S. view was stated in its most definitive form: "Since the Convention is an overall '*package deal*' reflecting different priorities of different States, to permit reservations would inevitably permit one State to eliminate the 'quid' of another State's 'quo'. Thus there was general

<sup>25</sup> *Id.* at 65–66.

<sup>26</sup> Speech by U.S. Representative John R. Stevenson to the Second Session of UNCLOS III, July 11, 1974, in 71 DEP'T ST. BULL. 232, 233 (1974) (emphasis added).

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> REPORTS OF THE U.S. DELEGATION, *supra* note 24, at 83. (Committee II was created to discuss all of the traditional jurisdictional questions, e.g., territorial sea, continental shelf, high seas.)



agreement in the Conference that in principle reservations could not be permitted."<sup>29</sup>

Before examining the views of other UNCLOS III participating states on the status and character of the package deal, it is important to note the statement made by U.S. Ambassador James L. Malone in Plenary on April 30, 1982. Ambassador Malone, in announcing that the United States was not going to vote in favor of the Convention, stated:

Within the context of an *overall acceptable treaty* [President Reagan] noted that those many provisions dealing with navigation, overflight, the continental shelf, marine research and environment, and other areas are basically constructive and in the interest of the international community. They are, of course, not perfect, *but they do represent the product of hard negotiation and reasonable compromise.*<sup>30</sup>

Notwithstanding the accuracy of this summary of the compromises that constitute the package deal character of the 1982 Convention, the United States Government subsequently took the view that the vast majority of the Convention reflects existing customary international law.<sup>31</sup> On the basis of this argument, President Reagan proclaimed a 200-nautical-mile exclusive economic zone on March 10, 1983.<sup>32</sup> This proclamation was accompanied by a presidential policy statement accepting those provisions of the 1982 Convention which relate to the "traditional uses of the oceans" and which "generally confirm existing maritime law and practice and fairly balance the interests of all states." In addition, the statement announced that "the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention."<sup>33</sup> In essence, it appears that the

<sup>29</sup> *Id.* at 449 (emphasis added).

<sup>30</sup> *Id.* at 594 (emphasis added). In an earlier statement, Ambassador Malone had commented that "[i]t has always been well understood at the Law of the Sea Conference that a successful treaty must be based on a package deal." *Law of the Sea Negotiations: Hearings Before the Subcomm. on Arms Control, Oceans, International Operations and Environment of the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 2-3 (1981).

<sup>31</sup> In referring to the policy statement that accompanied the President's EEZ proclamation of March 10, 1983, Assistant Secretary Malone asserted: "In order to fully grasp and appreciate that policy, however, a key principle underlying it—namely, that the nonseabed sections of the treaty reflect customary law in distinction to those prescribing the mining regime—must be understood." BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POLICY NO. 617, FREEDOM AND OPPORTUNITY: FOUNDATION FOR A DYNAMIC NATIONAL OCEANS POLICY (1984) (address by James L. Malone). For a different view, see Van Dyke, *Going It Alone Is Bad for America*, Wash. Post, May 12, 1985, at B1.

<sup>32</sup> "[I]nternational law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction." Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983), reprinted in 77 AJIL 621 (1983), 22 ILM 465 (1983).

<sup>33</sup> 19 WEEKLY COMP. PRES. DOC. 383-84 (Mar. 10, 1983), reprinted in 77 AJIL 619-20, 22 ILM at 464. To indicate the reciprocal character of this statement, the President added that "the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states." *Id.* However, it appears that the President's EEZ proclamation does not conform to this statement. On this problem, see the comments made by the Panel on the Law of Ocean Uses, 79 AJIL 151 (1985).

United States, in remaining outside the 1982 Convention, will attempt to exercise rights it determines to be reflective of customary law, irrespective of its previous acknowledgment of the corresponding compromise duties.

Now that the position of the United States, a state not intending to become a party, has been presented, the views of other delegations will be surveyed in order to discover the conference's general view of the package deal.

Although the 1982 Convention does not generally allow reservations to be made,<sup>34</sup> it does provide that, when signing, ratifying or acceding to the Convention, a state may make statements or declarations "with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State."<sup>35</sup> Such declarations or statements, though they are specifically intended not to create legal relations, are noteworthy evidence of the views of the states that participated in the protracted UNCLOS III negotiations. They may not be considered within the realm of *travaux préparatoires* for purposes of the provisions on treaty interpretation of the 1969 Vienna Convention on the Law of Treaties;<sup>36</sup> nevertheless, such statements are useful summaries of the delegations' views of the negotiating process from which expectations of state behavior may arise.

Although the declarations made at the UNCLOS III signature session in Jamaica (1982)<sup>37</sup> are evidential in nature, it remains significant that a majority of states, industrial and developing alike, found it necessary to comment on the package deal. For example, Deputy Foreign Minister Gouzhenko of the Soviet Union remarked:

The new Convention represents a complex and indivisible package of closely interrelated compromise solutions to all major problems of the law of the sea. . . .

. . . [O]ne cannot adopt a selective approach to the norms of international law. The Convention is not a basket of fruit from which one can pick only those one fancies. As is well known, the new comprehensive Convention has been elaborated as a single and indivisible instrument, as a package of closely interrelated compromise decisions.<sup>38</sup>

The Deputy Prime Minister and Secretary of State for External Affairs of Canada emphasized that the

Convention sets out a broad range of new rights and responsibilities. If States arbitrarily select those they will recognize or deny, we will see not only the end of our dreams of a universal comprehensive convention

<sup>34</sup> See 1982 Convention, *supra* note 5, Art. 309.

<sup>35</sup> *Id.*, Art. 310.

<sup>36</sup> UNTS Registration No. 18,232, UN Doc. A/CONF.39/27 (1969), Art. 32. For a detailed discussion of the Convention, see I. SINCLAIR, *supra* note 10.

<sup>37</sup> See note 44 *infra*.

<sup>38</sup> Verbatim records [hereinafter cited as VR] of the 191st plen. mtg. (1982), 17 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS [hereinafter cited as OFF. REC.] 106-07.

on the law of the sea but perhaps the end of any prospect for global co-operation on issues that touch the lives of all mankind. We must not—we cannot—allow that to happen. The United Nations Convention on the Law of the Sea, and that alone, provides a firm basis for the peaceful conduct of ocean affairs for the years to come.<sup>39</sup>

Mr. Adderley, speaking for the Bahamas, noted that “[t]he objective of the Conference was a ‘package deal’.” It was in this context that serious-minded delegations accepted that it would be impossible to satisfy each other’s individual concerns. In this spirit, compromise agreements have been reached.<sup>40</sup>

The representative of Vietnam found it necessary to comment directly upon the practical effects of the package deal: “my delegation willingly subscribes to the global compromise and the method for the overall settlement of all law-of-the-sea problems, which make the Convention an indivisible package excluding any selective application.”<sup>41</sup>

The delegate of Suriname, echoing the views advanced by many other delegations concerning the rights of third states, asserted that “[t]he Convention is a compromise document prepared in the course of lengthy and arduous negotiations. All States had to make concessions during those negotiations. The States that fail to adopt the treaty should not entertain the misguided hope that the Convention will just evaporate.”<sup>42</sup>

Finally, the Danish delegation found it necessary to address the precedent-setting nature of UNCLOS III:

This is a unique event in the history of international law. The Convention on the Law of the Sea is the most comprehensive treaty ever drafted. It is a modern constitution for the uses of the ocean. It deals with all conceivable peaceful human activities in an area larger than 70 per cent of the surface of our globe. It has been worked out by the largest Conference in the history of the United Nations. The result embodied in the 320 articles and related annexes and resolutions reflects a willingness to co-operate and to accept compromise solutions, expressed in two basic concepts: the consensus principle and the “package deal” principle.<sup>43</sup>

It appears, therefore, that the vast majority of the states<sup>44</sup> that participated in the conference, including the United States, consented in some fashion to the idea of the package deal. The question that now arises is, To what extent, if any, has the adoption of such a procedure affected the traditional relationship between treaties and custom as reflected in the 1982 Convention?

<sup>39</sup> VR 185th plen. mtg. (1982), *id.* at 16.

<sup>40</sup> VR 191st plen. mtg. (1982), *id.* at 104.

<sup>41</sup> *Id.* at 103.

<sup>42</sup> VR 187th plen. mtg. (1982), *id.* at 41.

<sup>43</sup> VR 191st plen. mtg. (1982), *id.* at 111.

<sup>44</sup> See, e.g., the statements made at the 185th, 187th, 189th, 191st and 192d plenary meetings by Australia (*id.* at 44), Austria (*id.* at 124), Bangladesh (*id.* at 112), Barbados (*id.* at 130), Brazil (*id.* at 39), Cameroon (*id.* at 16), Colombia (*id.* at 82), Fiji (*id.* at 43), Finland (*id.* at 42), Iran (*id.* at 105), Kenya (*id.* at 47), Mexico (*id.* at 19), Sierra Leone (*id.* at 131), Sri Lanka (*id.* at 48), St. Vincent (*id.* at 112) and Tanzania (*id.* at 50).

### III. THE TRADITIONAL TREATY-CUSTOM RULES

To understand how the package deal may have affected the traditional treaty-custom relationships, it is necessary first to survey the conventional rules. Article 34 of the 1969 Vienna Convention on the Law of Treaties<sup>45</sup> provides: "A treaty does not create either obligations or rights for a third State without its consent," i.e., the familiar maxim, *pacta tertiis nec nocent nec prosunt*. This general rule, of course, is modified by Article 38: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law." Article 38 appears to suggest that provisions of multilateral treaties that reflect customary norms can be invoked *against* as well as *by* third states. Such provisions would operate between states parties on the basis of treaty law and between any other combination of parties and nonparties on the basis that they reflect customary law. As noted early on by the International Law Commission (ILC):

A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States.<sup>46</sup>

Clearly, treaty provisions can reflect customary international law and therefore provide evidence of rights possessed by, and obligations binding upon, third states, but how are such customary provisions identified? When the treaty represents the codification of preexisting customary rules, as does the 1958 Geneva Convention on the High Seas,<sup>47</sup> the identification of customary provisions is straightforward. However, many treaties not only state preexisting rules (codification) but also are instrumental in creating new law (progressive development).<sup>48</sup> An excellent example is the 1969 Vienna Convention on the Law of Treaties.<sup>49</sup> As the ILC noted when submitting its final draft articles on the law of treaties: "The Commission's work on the law of treaties constitutes both codification and progressive development of international law. . . ."<sup>50</sup> Furthermore, in several instances the International Court of Justice has noted the customary status of provisions in the Vienna Convention. For example, both Article 62 (termination of a treaty by a

<sup>45</sup> See note 36 *supra*.

<sup>46</sup> Report of the International Law Commission to the General Assembly, [1950] 2 Y.B. INT'L L. COMM'N 364, 368, UN Doc. A/CN.4/SER.A/1950/Add.1.

<sup>47</sup> See Convention on the High Seas, *supra* note 4. The Preamble states: "*The States Parties to this Convention . . . adopted the following provisions as generally declaratory of established principles of international law.*"

<sup>48</sup> For an excellent discussion of the distinction between codification and progressive development, see I. SINCLAIR, *supra* note 10, at 10-21.

<sup>49</sup> *Id.*

<sup>50</sup> Reports of the Commission to the General Assembly, [1966] 2 Y.B. INT'L L. COMM'N 169, 177, UN Doc. A/CN.4/SER.A/1966/Add.1.

fundamental change of circumstances)<sup>51</sup> and Article 60 (termination of a treaty due to material breach)<sup>52</sup> were identified by the Court as having passed into the general corpus of international law.

When a treaty both codifies existing customary norms and develops new conventional rules, determining which provisions fall into each category may present enormous difficulties.<sup>53</sup> The situation is further complicated by the fact that the innovative provisions of treaties may represent "the *fons et origo* of a rule of international law which subsequently secure[s] the general assent of States and thereby [is] transformed into customary law."<sup>54</sup> As the International Court of Justice noted of such a transformation: "There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed."<sup>55</sup> Therefore, those treaty provisions which traditionally create rights and obligations for third states may do so for two reasons: either they reflect custom that existed prior to the negotiation of the treaty or, as a result of the place within the treaty of a particular provision, it has provided the impetus for the creation of a new customary rule.

To determine whether an innovative treaty provision has subsequently acquired customary status requires evaluating it in light of the classical conditions necessary to transform state practice into customary law. As the Court noted in the *North Sea Continental Shelf Cases*, those requirements include uniformity, consistency, *opinio juris* and, to a lesser extent, time.<sup>56</sup> The evi-

<sup>51</sup>

This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.

Fisheries Jurisdiction (UK v. Ice.), Jurisdiction of the Court, 1973 ICJ REP. 3, 18 (Judgment of Feb. 2).

<sup>52</sup> "The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject." Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 ICJ REP. 6, 47 (Order of Jan. 26).

<sup>53</sup>

[T]he line between codification and "progressive" development is a shadowy one as is, for much the same reasons, the line between custom as a material source of a codificatory treaty provision and a treaty provision as a material source of new rules of customary international law. In this field of codification and progressive development, the custom/treaty relationship is not so much one of a distinction as of a reciprocating effect.

Jennings, *supra* note 17, at 624.

<sup>54</sup> See Baxter, *supra* note 14, at 277.

<sup>55</sup> See *North Sea Continental Shelf Cases*, 1969 ICJ REP. at 41.

<sup>56</sup> *Id.* See also the comment of Sir Ian Sinclair:

The Court, having accorded a cautious recognition to the process whereby certain multilateral conventions may generate rules which gradually come to be accepted as forming part of customary international law, immediately proceeded to indicate, in general terms, the conditions which must be satisfied before the process can be regarded as having been effective. In the first place, the conventional provision whose transformation into a rule

It should be clear at this point that the role of treaties in the formative process of customary international law has been well established by both the International Court of Justice and the collective scholarship of numerous authors. However, as with so many generalities that characterize the constantly evolving corpus of international law, there are exceptions to the traditional general rules.

#### IV. THE LEGAL EFFECT OF THE PACKAGE DEAL

In the *Reparations for Injuries* Advisory Opinion of 1949,<sup>61</sup> the International Court of Justice observed:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.<sup>62</sup>

Here, the Court is clearly indicating that the evolution of the international community, especially the collective activities of states (e.g., the United Nations), has had a pronounced effect upon the needs of the community and, as a result, must be reflected in evolving international law. The attribution of international legal personality to intergovernmental organizations was a product of such evolutionary changes. International law, therefore, mirrors fundamental changes produced by the evolving needs of the international community and must itself be viewed as a constantly evolving phenomenon. Traditional rules notwithstanding, major evolutionary changes within the international community are capable of producing major evolutionary changes in international law.

Examples of important evolutionary changes in the international community can be found in the precedent-setting negotiations at UNCLOS III.<sup>63</sup> Not only did the entire community of nations comprising over 150 states come together in a lawmaking forum for the first time in history; these nations also consented to many procedures novel to the negotiation of mul-

<sup>61</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ REP. 174 (Advisory Opinion of Apr. 11).

<sup>62</sup> *Id.* at 178.

<sup>63</sup> As Judge Jennings has made clear:

Perhaps the most remarkable innovation of all has been the Third United Nations Conference on the Law of the Sea, in attempting to rewrite the entire law of the sea in "an international treaty of universal character, generally agreed upon". The procedures adopted by the conference have been novel in many important respects. Whatever the ultimate outcome of that Conference, it is certain that these procedures must leave their mark, and that international law will never be the same again.

Jennings, *Law-Making and Package Deal*, in *MÉLANGES OFFERTS À PAUL REUTER* 347, 347-48 (1981).

tilateral agreements.<sup>64</sup> These procedures included, inter alia, the adoption of all substantive measures by consensus and the interrelated procedure of the package deal.

It must be remembered that international law flows from the common consent of sovereign states and that they are free mutually to modify it within recognized limits. There is no reason why the states participating at UNCLOS III could not have collectively agreed to modify the traditional relationship between treaties and custom. Professor Baxter, in commenting on the exceptions to the traditional treaty-custom rules several years before the conference, noted:

The doctrine of integration and the interdependence of treaty provisions may also mean that a State was willing to accept a given formula for one article only if it gained its way on another. The bargain, to the extent that compromise and adjustment were involved, is incorporated in the treaty as a whole, and single articles should not be signed out and turned against a particular State. A more accurate view of the attitude of the particular State might be gained from an examination of its voting record on individual articles and paragraphs, but even here a vote in favour of a particular provision does not necessarily reflect the State's attitude toward international law on that question.<sup>65</sup>

What Professor Baxter termed the "doctrine of integration and the interdependence of treaty provisions" is clearly a more eloquent way of referring to the package deal.

It appears that the effect of the package deal upon treaty-custom rules is not limited to the 1982 Convention but may equally apply to the Vienna Convention on the Law of Treaties. Previously, it was noted that "the interaction between norm-creating and procedural provisions" of the Vienna Convention was a factor in determining whether certain provisions of the treaty were reflective of customary international law.<sup>66</sup> As the author who made this statement further explained:

This last is a factor which is perhaps unique to the Vienna Convention on the Law of Treaties; but the drafting history of the Convention makes it abundantly clear that, for the majority of States, the acceptance

<sup>64</sup> Again, in the view of Judge Jennings:

The Third United Nations Conference on the Law of the Sea has been different from previous diplomatic law-making conferences, not only in the number of new States involved, and the broad sweep of its task, but also in certain procedural respects which are of specific juridical significance. There are, for example, the important procedural innovations, such as the employment of consensus rather than voting during the negotiating stages, the free use of unofficial inter-sessional meetings, the sparsity of the official records, and, probably most important, the devices employed for drafting, and then revising, the series of negotiating texts.

*Id.* at 348.

<sup>65</sup> Baxter, *supra* note 14, at 293. Note that Professor Baxter's suggestion, turning to the individual state's voting record, would not be possible under the UNCLOS III consensus procedure.

<sup>66</sup> See note 57 *supra* and accompanying text.

of certain norm-creating provisions, particularly in Part V of the Convention, was conditional upon the inclusion in the Convention of specific procedural safeguards. It may therefore be concluded that this special feature of the Vienna Convention will constitute an additional hurdle to be overcome in seeking to establish, in the future, the custom-generating effect of particular Convention rules.<sup>67</sup>

Clearly, a compromise based on the acceptance of certain provisions for agreement on others created an integrated linkage between many of the articles of the Vienna Convention. This interrelationship of treaty provisions may therefore keep within the scope of treaty law binding only upon states parties individual articles that traditionally would have achieved customary status.

With respect to the 1982 Convention, the situation is much clearer. Whereas the package deal element of the Vienna Convention resulted from the spontaneous action of states, the package deal character of the 1982 Convention pervaded all the work of UNCLOS III and was unquestionably premeditated by states. No state participating in UNCLOS III could have been unaware of the presence and implications of the package deal. The numerous statements made by delegations at the signature session and the records of the conference<sup>68</sup> indicate that the package deal represented one of the most significant features of the negotiations; i.e., the leitmotif of UNCLOS III.

If we now assume that the package deal has created some profound juridical implications for the traditional treaty-custom rules, it remains to be seen how these traditional rules have been specifically affected. First, however, another problem posed by the 1982 Convention deserves mention:

[A]llowing for the *North Sea Continental Shelf Cases*, it seems likely that state practice will confirm or come to accept many of the particular Convention rules (whether those duplicating or building upon the 1958 Conventions or those adding to them) as being binding as custom. But it must be borne in mind that the consensus favouring the inclusion of a particular rule as a part of the overall package may mask opposition to the rule taken by itself. A number of provisions in the area of the more traditional law of the sea, as well as the acceptance of compulsory judicial and arbitral settlement, were, for example, concessions by developing states to which acceptance of the deep sea-bed régime was a necessary counterweight. Paradoxically, the attempt at consensus may, in the event, have hindered the development of customary international law in some cases. Had each provision been voted upon, the presence or absence of genuine agreement would have been more evident. . . .<sup>69</sup>

The consensus procedure adopted at UNCLOS III thus appears to be inextricably connected to the legal effect the package deal has had upon the treaty-custom rules.

<sup>67</sup> I. SINCLAIR, *supra* note 10, at 24.

<sup>68</sup> See generally THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS (R. Platzöder ed. 1982-).

<sup>69</sup> D. HARRIS, *supra* note 59, at 286.



Undoubtedly, the right of third states to invoke provisions of the 1982 Convention on the basis of their potential transformation into customary law is in serious jeopardy. As Judge Jennings has noted: "The package deal idea has meant that even firmly established parts of international law, already successfully codified at the 1958 Conference, were, so to speak, put in jeopardy by the negotiating process by being made part of it."<sup>70</sup>

Judge Jennings elaborated on the interplay between consensus and the package deal as follows:

An even more difficult question is the position of States which have not ratified the treaty, once it is in force? What will be the law of the sea for non-parties?

Whatever else that "other" law may be, it will certainly not be the customary international law of the sea as it existed at the commencement of the conference. Customary law has been developing during that period, as has already been mentioned, and there can be no doubt that the existence of the conference contributed to the process. It could not in the nature of things be otherwise. And certainly the existence of corresponding stable elements in the negotiating texts (apparently fixed items of the package, as it were) has contributed not a little to the process. For where the requirement is to distil the law from practice and opinion, any text which purports to represent a consensus and is properly drafted, will be seized upon and may be in practice difficult or impossible to displace.<sup>71</sup>

The views of states, the UNCLOS III records, and the writings of highly qualified jurists demonstrate that the 1982 Convention represents an indivisible package of interrelated compromises in which third states cannot generally find support for the exercise of customary rights. In the view of Ambassador Arias-Schreiber of Peru, speaking on behalf of the Group of 77 before the UNCLOS III Plenary:

In negotiating and adopting the [Law of the Sea] Convention, the Conference had borne in mind that the problems of ocean space were closely interrelated and had to be dealt with as a whole. The "package deal" approach ruled out any selective application of the Convention. According to the understanding reached by the Conference from the outset and in conformity with international law, no State or group of States could lawfully claim rights or invoke the obligations of third States by reference to individual provisions of the Convention unless that State or group of States were themselves parties to the Convention. States which decided to become parties to the Convention would likewise be under no obligation to apply its provisions vis-à-vis States that were not parties. That held true both for the new rules laid down by the Convention for areas under national jurisdiction (inland waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, archipelagic waters and straits used for international navigation),

<sup>70</sup> Jennings, *supra* note 63, at 348.

<sup>71</sup> *Id.* at 353. Judge de Lacharrière apparently shares Judge Jennings's view of the legal effect of the package deal principle. See de Lacharrière, *La Réforme du droit de la mer et le rôle de la Conférence des Nations Unies*, 84 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 216 (1980).

and for the régime instituted, by virtue of the Convention and the relevant resolutions adopted by the Conference, for the use of the area of the sea-bed beyond the limits of national jurisdiction.<sup>72</sup>

Furthermore, Ambassador Tommy Koh of Singapore, the President of UNCLOS III, referring to the statements made by states at the signature session in Montego Bay, noted:

The second theme which emerged from the statements is that the provisions of the Convention are closely interrelated and form an integral package. Thus it is not possible for a State to pick what it likes and to disregard what it does not like. It was also said that rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations.<sup>73</sup>

Although the Convention consists of a series of compromises, they form an integral whole. This is why the Convention does not provide for reservations. It is therefore not possible for States to pick what they like and disregard what they do not like. In international law, as in domestic law, rights and duties go hand in hand. It is therefore legally impermissible to claim rights under the Convention without being willing to assume the correlative duties.<sup>74</sup>

Finally, Senator Claiborne Pell (D., R.I.), speaking at a hearing before a subcommittee of the Senate Committee on Foreign Relations (which was reviewing the U.S. position on whether to sign the 1982 Convention), posed the problem in an interesting way:

Let me put my next point in simple terms. What we are doing is saying, this is a pretty interesting treaty. Those cherries that we like we will eat, but those cherries that we do not like we will ignore. Those cherries that we like we say are customary international law, but those cherries that we do not like we say we will not adhere to. . . .

. . . [H]ow is it that we can look at treaties and take out of them those positions of which we approve, and say we will adhere to those, and that we expect others to adhere to them, and those provisions we do not like we say we will not adhere to, and it does not matter if others adhere to them or not. I think there are a great many treaties that we would like portions of, but not the whole treaty.<sup>75</sup>

Although put in simplified form, Senator Pell's remarks hit at the heart of the legal effect generated by the package deal: third states may not be able to enjoy provisions of the 1982 Convention simply because state practice has apparently transformed some of its innovative provisions into customary international law. The package nature of the 1982 Convention links nearly all of its provisions together, rendering them indivisible and thus modifying

<sup>72</sup> UN Doc A/CONF.62/SR.183, at 3-4 (1982), 17 OFF. REC. at 3.

<sup>73</sup> LAW OF THE SEA, *supra* note 5, at xxxiv.

<sup>74</sup> *Id.* at xxxvi.

<sup>75</sup> *Law of the Sea Negotiations: Hearing Before the Subcomm. on Arms Control, Oceans, International Operations and Environment of the Senate Comm. on Foreign Relations, 97th Cong., 2d Sess. 18-19 (1982).*

the application of the traditional treaty-custom rules identified by the Court in the *North Sea* cases.<sup>76</sup>

#### V. THE LIMITATIONS OF THE PACKAGE DEAL

The legal effect of the package deal, albeit a significant departure from the traditional treaty-custom rules, is not without its limitations. The door has not been completely closed on the ability of the 1982 Convention to reflect customary rights and obligations binding upon third states. The limitations apply to two categories of customary norms. First, and most important, the package deal cannot affect those provisions of the Convention which were carried over directly from the 1958 Conventions<sup>77</sup> and which reflected customary law prior to UNCLOS III. Such provisions, irrespective of their place within the 1982 package, continue to be exercisable by, and binding upon, third states. However, where established customary rules appearing in the 1982 Convention have been changed, it must not be presumed that such modifications have acquired similar status.<sup>78</sup> In fact, significant changes have been made in the majority of such articles in the 1982 Convention.<sup>79</sup>

The other group of provisions that remain unaffected by the package deal includes all of the innovative provisions of the 1982 Convention that achieved customary status while the negotiations were being held, that is, after the conference began in 1973 and before the adoption of the treaty on April 30, 1982.<sup>80</sup> This exception holds true only because the package deal could not have crystallized all of the provisions of the Convention into an indivisible whole before the treaty was adopted.<sup>81</sup> As the President of the conference noted:

<sup>76</sup> See notes 56-57 *supra* and accompanying text.

<sup>77</sup> See *supra* note 4.

<sup>78</sup> For example, while Article 17 of the 1982 Convention (right of innocent passage) no doubt reflects customary law (see Article 14(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, *supra* note 4), the modifications that appear in Articles 18 and 19 may not have attained similar status.

<sup>79</sup> As Judge Jennings has pointed out:

[O]ther laws hitherto thought to be firmly established [in customary international law] have not remained intact. Notably the regime of the high seas, as it is expressed in the [1982 Convention], has seen significant changes, as a result, at least in part, of the bargaining process; even though the principle of the freedom of the high seas with all its corollaries was formerly regarded as perhaps the most firmly established of all the body of international customary law. It need hardly be added that the meaning and content of the regime of the high seas is also central to the question of deep-sea mining, which has been the most strenuously debated of all the elements in the negotiating process.

Jennings, *supra* note 63, at 349. Elsewhere Judge Jennings noted that "[t]here is virtually no part of customary law that could be codified sensibly without considerable elements of progressive development to fill gaps, to clarify doubts, controversies and uncertainties, to crystallise actual rules from vaguer principles or notions and to achieve the necessary degree of elaboration." Jennings, *supra* note 17, at 623.

<sup>80</sup> This group, of course, includes those provisions of the 1982 Convention which reflect customary norms that came into existence between the conclusion of UNCLOS I (1958) and the beginning of UNCLOS III (1973).

<sup>81</sup> The 1982 Convention was adopted on Apr. 30, 1982, together with four resolutions embodied in the Final Act of the Conference, reprinted in *LAW OF THE SEA*, *supra* note 5, at 175.

[T]he very nature of the concept of a package deal must mean that no delegation's position on a particular issue would be treated as irrevocable until at least all the elements of the "package" as contemplated had formed the subject of agreement. Every delegation, therefore, had the right to reserve its position on any particular issue until it had received satisfaction on other issues which it considered to be of vital importance to it.<sup>82</sup>

It appears, therefore, that the package could not have been definitively "sealed" while the negotiations were still under way and that such a process could only have occurred when the 1982 Convention was formally adopted.

The innovative provisions of the Convention that achieved customary status before the package had crystallized are surely excluded from the effect of the package deal. Therefore, such provisions may continue to reflect rights and obligations for both parties and nonparties. A good example is part V of the Convention on the exclusive economic zone (EEZ). State practice in establishing 200-mile resource zones suggests that the EEZ concept had achieved customary status prior to the adoption of the 1982 Convention.<sup>83</sup> It must be emphasized that the customary rule does not derive from the EEZ provisions of the Convention but rather from the practice of states reflected in the combined effect of the numerous municipal laws establishing such zones and the numerous bilateral fisheries agreements concluded during the last 10 years. Clearly, exclusive economic zones as they now exist under customary international law may not resemble in all respects the EEZ regime embodied in the 1982 Convention.

The final category of provisions that require comment includes those which, as of April 30, 1982, had failed to achieve customary law status. If one assumes that the package deal was solidified at the time that the Convention was formally adopted, then those of its provisions that had not attained customary status by that date may have been precluded from ever doing so. Certainly, through time, certain third states may possibly begin to acquire rights reflected in the 1982 Convention vis-à-vis other third states, as well as states parties, through the acquiescence of uniform and widespread state practice. Such an outcome, however, cannot lightly be presumed to transfer the multitude of innovative provisions of the 1982 Convention into the general corpus of international law. Furthermore, such a process represents a two-edged sword in that it may make equally applicable to third states the innovative obligations in the Convention.

The full thrust of the legal effect of the package deal, therefore, applies to this third category of provisions. They constitute the major part of the

<sup>82</sup> Explanatory Memorandum by the President of the Conference, UN Doc. A/CONF.62/WP.10/Rev.1 (1979), reproduced in 10 *NEW DIRECTIONS IN THE LAW OF THE SEA* 134, 135 (M. Nordquist & K. Simmonds eds. 1980).

<sup>83</sup> See U.S. EEZ proclamation, *supra* note 32. According to a study conducted by the UN Secretariat, 54 states had proclaimed a 200-mile economic zone by 1983. *LAW OF THE SEA BULL.*, No. 2, December 1983, at vi.

Convention and include, most notably, Part III, Section II: Transit Passage, and most of Part XI: The Area.<sup>84</sup> More than 150 states agreed to the consensus and package deal negotiating procedures that juridically bound this final category of provisions to the entire Convention package. For this reason, third states may find it tremendously difficult to invoke such provisions under the traditional rules by which multilateral conventions provide the impetus for creating new customary norms.

Finally, to conclude, something should be said about the notion of the instant crystallization of customary international law and its application to the 1982 Convention. There are those who argue that, as nearly all the members of the international community had gathered at UNCLOS III, and through their collective efforts they adopted many provisions by consensus, the resulting articles automatically entered into customary international law.<sup>85</sup> Those who hold this view maintain that the requirements of time and *opinio juris* must be discounted because the entire international community acted collectively and swiftly to indicate its consent to these norms.

This proposition is indeed difficult to accept for two important reasons. First, an individual state not formally objecting to a particular provision may not, in every instance, be indicating its consent to be bound, regardless of whether or not the entire international community is participating in the consensus. Moreover, the true test for the existence of a customary norm of international law is state practice.<sup>86</sup> The legal relations arising from instruments concluded in multilateral negotiations are not customary in nature but rather contractual.

State practice, therefore, remains the exclusive means of identifying customary norms. In the case of the 1982 Convention, the package deal has created serious implications for the straightforward application of that test inasmuch as many provisions may be precluded from achieving customary status. The extent to which the future states parties feel bound to the package deal, and act accordingly in not acquiescing in the creation of customary norms, will determine which, if any, of the majority of the innovative provisions in the 1982 Convention will enter into the general corpus of international law. The future of the package deal therefore lies in the hands of the future states parties and in their commitment to its continuing effect.

Finally, to use the cogent words of Judge Jennings:

<sup>84</sup> It must be noted, however, that the principle that deep seabed mining beyond the limits of national jurisdiction can only be governed by the international regime established by the 1982 Convention is separate from the Convention itself and is capable of achieving customary status, if it has not done so already, irrespective of the status of part XI.

<sup>85</sup> For a discussion of the notion of instant customary international law, see Cheng, *United Nations Resolutions on Outer Space: 'Instant' International Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965); and H. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* (1972).

<sup>86</sup> Article 38(1)(b) of the Statute of the International Court of Justice makes it clear that the Court shall apply "international custom, as evidence of a general practice accepted as law" (emphasis added).

In the space of this article it has only been possible to refer to one aspect of the very many problems raised by recent developments in regard to the sources of international law and the ways in which law is made, elaborated, or changed. Even so it has been possible only to ask questions, and not at all to provide solutions. It is evident, however, that these new approaches to law-making and to the sources of international law need to be questioned, tested, and generally made part of a structured system. That is essentially a task for the academic international lawyer, and constitutes a challenge to his expertise and skills as important, and indeed urgent, as any in recent times.<sup>87</sup>

<sup>87</sup> Jennings, *supra* note 63, at 355.

## FUNCTIONALISM AND THE BALANCE OF INTERESTS IN THE LAW OF THE SEA: CUBA'S ROLE

By Alberto R. Coll\*

How adequate is functionalism as a comprehensive theory of international politics and law? In its classic version, functionalism posits that, as economic and technological interdependence grows, diplomacy and the elaboration of international legal rules will be shaped increasingly by functional concerns and less and less by ideology and "high politics."<sup>1</sup> While such a trend is evident in some areas of international relations, such as the European Community, it is less so in others. In many negotiations and disputes around the globe, even though the issues may be amenable to a functional approach and resolution, states continue to give great weight to ideological and political considerations in their diplomacy and legal stances. Proponents of functionalism have assumed that the growing tide of functional links and relationships eventually will dominate international relations and render political and ideological conflicts less significant, if not mostly irrelevant. But in many cases, the reverse has happened. International organizations set up for functional purposes have been inundated by political and ideological rivalries, and international legal issues of a functional character have been seized upon by states to advance their ideological and political objectives. Cuba's policy towards the law of the sea serves as a case study of this problem.

An analysis of Cuban policy is revealing in another respect. The 1982 United Nations Convention on the Law of the Sea represented a long sought and strenuously pursued accommodation of divergent and often clashing national interests within the international community.<sup>2</sup> Among its most significant aspects was the degree to which the Convention and the long diplomatic conference that preceded it (the Third United Nations Conference on the Law of the Sea, UNCLOS III, 1973-1982) illustrated the indissoluble and highly creative union of law and power, of legal rules and principles on

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<sup>1</sup> For presentations of the case for functionalism, see D. MITRANY, *THE FUNCTIONAL THEORY OF POLITICS* (1975); D. MITRANY, *A WORKING PEACE SYSTEM* (1966); E. HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950-1957* (2d ed. 1968). For critiques, see I. CLAUDE, *SWORDS INTO PLOWSHARES* (3d ed. 1971); K. THOMPSON, *ETHICS, FUNCTIONALISM AND POWER* (1980).

<sup>2</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, *reprinted in* UNITED NATIONS, *THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* (UN Pub. Sales No. E.83.V.5) [hereinafter cited as *Convention*]. The Convention will come into force when 60 countries ratify it. For the number of ratifications as of July 1, 1985, see Caminos & Molitor, *Progressive Development of International Law and the Package Deal*, at p. 872 n.7 *supra*. On July 9, 1982, President Reagan announced his intention not to submit the Convention to the Senate for advice and consent as to ratification. 18 WEEKLY COMP. PRES. DOC. 887 (July 12, 1982); DEP'T ST. BULL., No. 2065, Aug. 1982, at 71.

the one hand, and diplomacy in the service of state interests on the other, that marks statecraft in present-day international society.<sup>3</sup> This accommodation of conflicting national interests through law took place at two levels: at the level of interstate relations, in which states adjusted their goals with those of other states; and at the domestic level, which involved the adjustment within the structure of its foreign policy of numerous claims made upon a state by external and internal factors. As with much of the diplomatic bargaining underlying the development of international legal rules, the positions taken by a state at UNCLOS III on the complex issues of the law of the sea often reflected a difficult balance of competing interests in its foreign policy, and the reconciliation of conflicting demands on its role in the international system.<sup>4</sup> As a small power that is able to wield significant global and regional influence in spite of its limited resources, Cuba offers an especially interesting example of this balancing of interests. A detailed analysis of Cuba's policies towards the law of the sea also offers valuable general insights into the special relationship of international law to diplomacy, which is at the heart of the union of law and power in international politics.

Cuba had defined its legal positions on the law of the sea by the time the second working session of UNCLOS III, held in Caracas, Venezuela, came to a close on August 29, 1974, and for the most part they remained unchanged throughout the rest of the conference. The determining factors of these positions were geographic, political, military and economic.

Geographically, Cuba is a large island surrounded by six narrow straits of tremendous strategic importance, a fact that helps to account for Cuba's significance to both superpowers.<sup>5</sup> The proximity of the United States, its

<sup>3</sup> McDougal, *Law and Power*, 46 AJIL 102 (1952); Dillard, *Some Aspects of Law and Diplomacy*, 91 RECUEIL DES COURS 447 (1957 I); Moore, *Law and National Security*, 51 FOREIGN AFF. 408 (1973); Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 AJIL 109 (1983).

<sup>4</sup> UNCLOS III began in December 1973, and after eleven sessions ended in December 1982. For successive analyses of the negotiations, see Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AJIL 1 (1974); Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AJIL 1 (1975); Stevenson & Oxman, *The 1975 Geneva Session*, 69 AJIL 763 (1975); and all by Oxman, *The 1976 New York Sessions*, 71 AJIL 247 (1977); *The 1977 New York Session*, 72 AJIL 57 (1978); *The Seventh Session (1978)*, 73 AJIL 1 (1979); *The Eighth Session (1979)*, 74 AJIL 1 (1980); *The Ninth Session (1980)*, 75 AJIL 211 (1981); *The Tenth Session (1981)*, 76 AJIL 1 (1982). For a comprehensive history of the law of the sea and many of its difficult issues, see D. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* (2 vols. 1984).

<sup>5</sup> The straits are as follows:

- (1) Yucatán: borders Mexico; 2000-meter depth; 117 miles wide.
- (2) Florida: borders U.S.; 1500-meter depth; 90 miles wide.
- (3) Nicholas Channel: borders Bahamas; 500-meter depth; 24 miles wide.
- (4) Old Bahama Channel: borders Bahamas; 200-1000-meter depth; 86 miles wide.
- (5) Windward Passage: borders Haiti; 2000-meter depth; 43 miles wide.
- (6) Cayman: borders Jamaica; 6000-meter depth; 78 miles wide.



vast financial and consumer markets, and its advanced technology make the prospects of Cuban-American trade and economic cooperation very attractive to the Cuban Government. Yet, since 1961, a series of domestic and international factors have impelled the Cuban regime to pursue a foreign policy towards the United States that the U.S. Government has officially characterized as deeply hostile.<sup>6</sup> This hostility has found expression in two forms. First, at forums of multilateral diplomacy such as the United Nations and UNCLOS III, the Cubans skillfully have capitalized on many of the grievances of the developing nations towards the industrialized countries in general, and the West in particular, to put the United States on the defensive politically and diplomatically. Second, in its bilateral links with other states and in its general policies abroad, Cuba consistently has supported political goals sharply opposed to those of American foreign policy. So, while in its bilateral negotiations with the United States on functional issues such as fishing rights, tourism and trade Cuba has sought to improve relations and has followed generally a conciliatory line, in its multilateral diplomacy Cuba has been a key factor and often a leader in the pursuit of anti-American policies that have been popular with much of the Third World and Latin America and have strengthened the image of Fidel Castro at home as a bold champion of Cuban nationalism. This was the case at UNCLOS III, even with regard to issues that lent themselves to a functional, nonpolitical approach.

Politically and economically, Cuba has been closely allied with the Soviet bloc since 1961, as it depends on the USSR for most of its oil and all of its military defense.<sup>7</sup> Yet, since 1970 and the temporary thaw in superpower relations that accompanied détente, Castro has sought to diminish the isolation of Cuba from Latin America and increase its voice in regional affairs. This trend coincided with Cuba's increasing visibility in the nonaligned movement and the political and economic debates engendered by the North-South dialogue between the Third World countries and the industrialized states. Since the early 1970s, Cuban foreign policy has been caught in tension between the desire to amplify and even give a degree of independence to Cuba's international role, and the inescapable realities of ever growing economic and military dependence on Moscow. The political climate between Cuba and the United States, adverse as it has been to their economic relations, combined with Cuba's poor economic performance over the last two decades and backward industrial base, has led the Cuban Government to pursue, within the constraints of its dependence on the Soviet bloc, a policy aimed at the development of large merchant and fishing fleets and intensive land-mining production. In this way, Cuba hopes to build a sounder economic base, a point of no small relevance for Cuba's law of the sea diplomacy.<sup>8</sup>

<sup>6</sup> BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POLICY NO. 600, CUBA AS A MODEL AND A CHALLENGE (1984) (text of address by Kenneth N. Skoug, Jr., Director of the Office of Cuban Affairs, New York, July 25, 1984). See also Domínguez, *Cuban Foreign Policy*, 57 FOREIGN AFF. 83 (1978); CUBA IN THE WORLD (C. Blasier & C. Mesa-Lago eds. 1979); CUBAN COMMUNISM (I. Horowitz ed. 1981); P. FALK, CUBAN FOREIGN POLICY (1985).

<sup>7</sup> Domínguez, *CUBA IN THE WORLD*; CUBAN COMMUNISM; P. FALK, all *supra* note 6.

<sup>8</sup> Menéndez, *La Marina mercante cubana*, Granma, Aug. 28, 1981, at 1; Menéndez, *Cuenta la flota mercante cubana con un peso muerto 17 veces mayor que el existente en 1958*, Granma, Mar.

Because of its close links with the Soviet bloc and its simultaneous ties with Latin America and the Third World, Cuba had to consider its stances on the law of the sea very carefully so as not to damage any of these extensive and somewhat diverse diplomatic and political relationships. As far as possible, Cuba had to avoid taking positions that would alienate unduly those states in Latin America and the nonaligned movement whose friendship it cultivated assiduously throughout the 1970s, while it promoted its own important interests in the law of the sea and those of the Soviet bloc. This meant several things. For example, the Cubans sometimes carried out much of their intense diplomatic work at UNCLOS III behind the scenes, in a quiet and unobtrusive way. They sought to ascertain the positions that different states in Latin America and other groups would take, and then tried to reconcile those positions with Cuba's and the USSR's through diplomatic dialogue and the articulation and clarification of legal rules designed to embody such consensus. At the same time, the Cuban delegation did not hesitate to seize upon major legal issues in order to attack the United States with all the weapons of public diplomacy at its disposal. Such tactics, while obviously unpalatable to the United States, did not cost Cuba much, if any, support among the blocs whose friendship it valued and brought it a high degree of diplomatic and political prestige out of proportion to its limited weight in the global balance of power. On the other hand, the outward ideological and political pluralism of Cuba's diplomatic relationships meant that no single bloc within UNCLOS III trusted the Cubans to promote vigorously all of that bloc's objectives. Hence, the Cubans failed to receive the support necessary to gain any of the bureau-level positions or chairmanships at the conference.

#### POLITICAL AND MILITARY FACTORS AFFECTING CUBAN POLICY

Since the rupture of diplomatic links in 1961, relations have generally been poor between Cuba and the United States. The Castro Government consistently has viewed its powerful neighbor as a dangerous adversary dedicated to the destruction of the Cuban Revolution. Numerous explanations have been offered for Castro's deep hostility and suspiciousness towards the United States. But few disagree on the consequences: growing Cuban economic and military dependence on the USSR since 1962, and an active Cuban foreign policy that in its rhetoric and goals has clashed repeatedly with U.S. objectives around the world.<sup>9</sup> Today, the USSR and its East Eu-

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19, 1979, at 2; Menéndez, *The Cuban Merchant Marine: A Fleet that Sails around the World*, *Granma Weekly Rev.*, July 17, 1983, at 15; Morales, *44 Naciones por el mismo camino*, *MAR Y PESCA*, No. 189, 1981, at 9; Ubeda, *Colaboración cubano-soviética en la esfera de la pesca*, *MAR Y PESCA*, No. 204, 1982, at 18; Morales, *Las Capturas de langostas en Cuba en el período 1959-1980*, *MAR Y PESCA*, No. 199, 1982, at 25. *Granma* is the official newspaper of Cuba's ruling Communist Party and performs a role similar to that of *Pravda* in the Soviet Union; it serves as the official voice of the Cuban Government and its policies. *Mar y Pesca* is the Cuban journal on marine and fishing issues; it, too, is owned and controlled by the Cuban Government.

<sup>9</sup> Domínguez, CUBA IN THE WORLD; CUBAN COMMUNISM; P. FALK, all *supra* note 6.

ropean allies hold the greatest weight in Cuban foreign policymaking.<sup>10</sup> Cuba is an associate member of the Soviet bloc's Council for Mutual Economic Assistance and depends on the Soviet Union for the purchases of large quantities of Cuban sugar and tobacco at prices higher than those on the world market. Soviet subsidies to the Cuban economy have been rising steadily since 1962 and today amount to over \$4 billion annually.<sup>11</sup> By 1985, Cuba's total debt to the Soviet Union and the Eastern bloc countries amounted to approximately \$22 billion.<sup>12</sup> There have been six to eight thousand Soviet civilian technical and economic advisers in Cuba since the early 1960s.<sup>13</sup>

The Soviet Union has enabled Cuba to become one of the strongest military powers in the Western Hemisphere.<sup>14</sup> With a permanent military force of 225,000, Cuba has the second largest army in Latin America, and the highest percentage of population in the armed forces (2.32 percent).<sup>15</sup> Cuba also maintains a large territorial militia numbering about 500,000. Its air force is considered one of the largest and probably the best equipped in Latin America, with two hundred sophisticated Soviet jet fighters, including four squadrons of MiG-23s whose range extends to portions of the southeastern United States, most of Central America and most Caribbean nations.<sup>16</sup>

Cuba's military power has an important international dimension. Since 1975, when it played a critical role in helping the forces of the Movement for the Popular Liberation of Angola gain power, Cuba has maintained some 25,000 troops and advisers in that country. In 1977, Cuba also sent ground forces and air force pilots to aid Ethiopia in its war with Somalia over the Ogaden; as of December 1984, there remained some six thousand Cuban military personnel in Ethiopia. There are large numbers of Cuban military advisers in Nicaragua and South Yemen as well.

The total cost of Soviet arms delivered to Cuba from 1960 to 1982 exceeded \$2.5 billion; annual shipments from 1969 to 1980 averaged 15,000 tons. The Soviets also have provided training and other kinds of support, and, as a signal of their political and military commitment to Cuba, they have maintained since 1962 a ground forces brigade of about 2,600, a military advisory group of 2,000 and the largest intelligence-collection facility outside the USSR.<sup>17</sup> The Soviet Union, however, never has formalized by treaty any obligation to defend the island, and even though Cuba has asked to join the Warsaw Pact, the request has not been granted.

<sup>10</sup> P. FALK, *supra* note 6.

<sup>11</sup> CUBA AS A MODEL AND A CHALLENGE, *supra* note 6, at 2.

<sup>12</sup> Falcoff, *Thinking about Cuba: Unscrambling Cuban Messages*, 6 WASH. Q. 101 (1983); *Cuban Report is Candid on Economic Burdens*, N.Y. Times, June 5, 1985, at D1, col. 1.

<sup>13</sup> BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, SPECIAL REPORT NO. 103, CUBAN ARMED FORCES AND THE SOVIET MILITARY PRESENCE 5 (1982) [hereinafter cited as CUBAN ARMED FORCES].

<sup>14</sup> COMMUNIST NATIONS' MILITARY ASSISTANCE 140-42 (Copper & Papp eds. 1983).

<sup>15</sup> 1982-1983 INTERNATIONAL INSTITUTE OF STRATEGIC STUDIES, THE MILITARY BALANCE; T. DUPUY, THE ALMANAC OF WORLD MILITARY POWER (1980). See also CUBAN ARMED FORCES, *supra* note 13, at 2.

<sup>16</sup> CUBAN ARMED FORCES, *supra* note 13, at 1, 3.

<sup>17</sup> *Id.* at 5.

Another important factor that has shaped the foreign policy of Cuba since 1962 has been its active support of Marxist revolution and "national liberation" struggles worldwide.<sup>18</sup> The instruments used to pursue such a policy have included propaganda, an excellent system of international broadcasting, limited economic and military aid, the training of personnel from various "national liberation" guerrilla movements, the sponsoring of negotiations among guerrilla factions designed to unite them (such as the 1979-1980 meetings in Havana that led to the formation of a military coalition among the major Salvadoran anti-Government forces)<sup>19</sup> and the holding of international conferences on national liberation warfare. The most notable of the latter was the "Tri-Continental Conference" at Havana organized by the Cuban Government in 1966. Among the participants were leaders from the then little-known pro-Marxist groups that were to gain power in Angola, Mozambique, Guinea-Bissau and Nicaragua in the decade that followed.<sup>20</sup>

<sup>18</sup> Valenta, *The USSR, Cuba and the Crisis in Central America*, 25 ORBIS 715, 720 (1981). In 1975, for example, Fidel Castro made proof of overseas "international solidarity" a criterion for membership in the Cuban Communist Party, and, in his main report to the First Party Congress in December 1975, he stated that "the starting point of Cuba's foreign policy, according to our Programmatic Platform, is the subordination of Cuban positions to the international needs of the struggle for socialism and for the national liberation of peoples." *Granma Weekly Rev.*, Jan. 11, 1976, at 2-3; *id.*, Jan. 4, 1976, at 10; *Granma*, Dec. 25, 1975, at 1.

<sup>19</sup> See FOREIGN BROADCAST INFORMATION SERVICE, ANALYSIS REPORT: CUBA'S POSTURE ON REVOLUTION IN CENTRAL AMERICA (1983), which discusses the important role played by the Cuban Government, and by Fidel Castro personally, in helping the various guerrilla factions in El Salvador to form a united insurgency. For the subject of Cuba's extensive involvement in El Salvador's guerrilla war, see generally *Cuban Defector Says Castro Finances Salvadoran Rebels' Arms Purchases*, Wash. Post, Nov. 19, 1984, at A10, col. 4; REPORT OF THE BI-PARTISAN COMMISSION ON CENTRAL AMERICA (1984); U.S. Dep't of State & Dep't of Defense, News Briefing on Intelligence Information on External Support of the Guerrillas in El Salvador, Aug. 8, 1984; U.S. DEP'T OF STATE & DEP'T OF DEFENSE, BACKGROUND PAPER: NICARAGUA'S MILITARY BUILD-UP AND SUPPORT FOR CENTRAL AMERICAN SUBVERSION (1984); *Defector: Salvadoran Rebels Closely Tied to Sandinistas*, Wash. Post, June 19, 1983, at A15, col. 1; U.S. DEP'T OF STATE & DEP'T OF DEFENSE, BACKGROUND PAPER: CENTRAL AMERICA (1983); H.R. REP. NO. 122, 98th Cong., 1st Sess. (1983); BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POLICY NO. 476, NICARAGUA: THREAT TO PEACE IN CENTRAL AMERICA (1983) (Statement by Thomas O. Enders, Assistant Secretary for Inter-American Affairs, before the Senate Foreign Relations Comm., Apr. 12, 1984); STAFF OF THE SUBCOMM. ON OVERSIGHT AND EVALUATION OF THE HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, 97TH CONG., 2D SESS., U.S. INTELLIGENCE PERFORMANCE ON CENTRAL AMERICA: ACHIEVEMENTS AND SELECTED INSTANCES OF CONCERN (Comm. Print 1982); Falcoff, *The El Salvador White Paper and its Critics*, 4 AM. ENTERPRISE INST. FOREIGN POL'Y & DEF. REV., No. 2, 1982, at 18; BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, SPECIAL REP. NO. 80, COMMUNIST INTERFERENCE IN EL SALVADOR (1981).

<sup>20</sup> The official name of the conference was the First Conference of the Organization of Solidarity of the Peoples of Asia, Africa and Latin America (OSPAAAL). Claire Sterling, a renowned expert on international terrorism, has called the conference an "unmistakable call for a Guerrilla International." Sterling, *Terrorism: Tracing the International Network*, N.Y. Times, Mar. 1, 1981, §6 (Magazine), at 6. She also notes that 10 months after the conference, over a dozen camps for training guerrillas from various parts of the world opened in Cuba under the general direction of Col. Vadim Kotchergine of the KGB, the Soviet secret police, and that "Cuban instructors have taught in Middle East *fedayeen* camps since the early seventies." C. STERLING, *THE TERROR NETWORK* 15 (1981).

Since 1973, Cuba has had close political ties with the Palestine Liberation Organization (PLO), and at UNCLOS III the Cuban delegation played a key role in promoting the invitation to the PLO to attend the conference.<sup>21</sup>

Despite its close relationship with the USSR, Cuba has sought acceptance within the nonaligned movement as a natural member and a bold champion of the general political and economic objectives of the Third World. Cuba was the first Latin American nation to attend the nonaligned summit conferences, and it was an avid supporter of the position taken by the Group of 77 in support of a "New International Economic Order" at the first United Nations Conference on Trade and Development (UNCTAD I), held in Geneva in 1964.<sup>22</sup> In 1979, Fidel Castro became Chairman of the non-aligned movement and hosted the Sixth Summit Conference of the Non-Aligned in Havana. Cuba played a leading role in that conference's strong criticisms of the United States for contesting the proposed seabed mining portions of the Law of the Sea Convention, and it was influential in the drafting of the final communiqué, which called for the "redistribution of wealth worldwide" and the preservation of Third World "sovereignty" over the exploitation of natural resources.<sup>23</sup>

Following its censure by the Organization of American States (OAS) in 1961 and the rupture of diplomatic relations with all states in the region except Mexico, Cuba underwent a decade-long period of diplomatic isolation from Latin America. In the early 1970s, however, Cuba began to renew full diplomatic and commercial contacts with many Latin American states and to pay special attention to regional interests and concerns, a process that coincided with a temporary decrease in the level of Cuban support for Latin

<sup>21</sup> See generally D. KOPILOW, *CASTRO, ISRAEL AND THE PLO* (1984); ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, *INTERNATIONAL REPORT: P.L.O. ACTIVITIES IN LATIN AMERICA* (1980). Cuba was one of only three non-Arab states that cosponsored the "Zionism is racism" resolution adopted by the UN General Assembly in 1975, and in May 1977 it was the only non-Arab country in the UN Economic and Social Council (ECOSOC) to demand that the resolution be included on the agenda of a United Nations-sponsored world conference on racism. Cuba's support for the PLO's participation in UNCLOS III was detailed in *Interviene OLP en la III Conferencia del Mar*, Granma, July 23, 1974, at 6.

<sup>22</sup> UNCTAD I, which was approved by ECOSOC and the General Assembly in 1962, met in Geneva for a 12-week period in 1964. Although 120 countries participated, the conference was dominated by a majority coalition of 77 developing states, which sought a new international economic order better suited to the needs and interests of the developing states of the Third World. The Group of 77, through resolutions approved at the conference, made a series of demands, which included the following: (1) stabilization of prices for primary commodities through international arrangements; (2) lowering of tariffs and other trade barriers on primary commodities; (3) provision of long-term, low-interest loans repayable in local currencies or in goods; and (4) a net flow of aid from developed states equal to 1 percent of their national income. The term "Group of 77" continues as a label, even though the number of states that support these objectives has grown to over a hundred. See A. BENNETT, *INTERNATIONAL ORGANIZATIONS* (3d ed. 1984). At UNCLOS III, the Group of 77 "included some 120 states." Lee, *The Law of the Sea Convention and Third States*, 77 AJIL 541, 547 (1983).

<sup>23</sup> See Cviic, *The Non-Aligned Summit in Havana*, 35 WORLD TODAY 387, 388 (1979); Carrasco & López, *Unidad y capacidad de acción*, VERDE OLIVO, No. 23, 1982, at 5.

American insurgency movements. Although Cuba failed to attend several key meetings at which Latin American states attempted to hammer out a common position on the law of the sea (Montevideo, 1970; Lima, 1970; and Santo Domingo, 1972), Cuba subsequently adopted as part of its law of the sea policy the Lima and Santo Domingo declarations concerning the acceptability of coastal state sovereignty over marine resources and broad jurisdictional rights within the "patrimonial sea" extending to 200 miles, and the requirement of international agreement before legal rules restricting the extent of the territorial sea could become valid.<sup>24</sup> At the seventh session of UNCLOS III in 1978, Cuba held the chairmanship of the Latin American Group, while the Mexican and Venezuelan delegates performed other duties as chairmen of various conference committees.<sup>25</sup>

#### ECONOMIC AND NAVAL FACTORS

As part of its efforts to diversify its economy, Cuba over the last two decades has developed large merchant and fishing fleets. While of significant economic value, these fleets also serve important political purposes. They give Cuba access to ports in Latin America and other areas of the Third World from which Cuba is able to promote its foreign policy objectives, including the support of revolutionary movements and Marxist regimes. Besides lending credence to the image of Cuba as a global power, the fleets perform valuable intelligence-gathering functions for the Cuban and the Soviet military. The merchant marine, quite insignificant in 1959, had grown to over one million dead-weight tons and more than a hundred vessels by 1983, which made it the third largest in Latin America next to those of Brazil and Argentina.<sup>26</sup> It includes oil tankers, chemical ships and container ships, and operates as far away as Japan and the Mediterranean. It has averaged an annual growth of 42,000 tons, one of the highest in the world.

Cuba's fishing fleet ranks eighth in the world. It has some 280 vessels with a total tonnage of 171,911 dead-weight tons, a figure that suggests an emphasis on trawlers for deepwater fishing far from Cuban shores.<sup>27</sup> In the

<sup>24</sup> The Declaration of Montevideo on the Law of the Sea was signed on May 8, 1970 by the Governments of Argentina, Brazil, Chile, Ecuador, El Salvador, Panama, Peru, Nicaragua and Uruguay; it is reprinted in 9 ILM 1081 (1970). On August 4-8 of the same year, the states participating in the Latin American Meeting on Aspects of the Law of the Sea drafted the Lima Declaration and Resolutions, UN Doc. A/AC.138/28 (Aug. 14, 1970), reprinted in 10 ILM 207 (1971). The Santo Domingo declaration was the most important because it represented the widest consensus achieved among Latin American states up to that time on specific law of the sea issues. For its text, see Declaration of Santo Domingo, Specialized Conference of the Caribbean Countries on Problems of the Sea, June 7, 1972, UN Doc. A/AC.138/80, 27 UN GAOR Supp. (No. 21) at 70, UN Doc. A/8721 (1972), reprinted in 11 ILM 892 (1972).

<sup>25</sup> Summary records [hereinafter cited as SR] of the General Comm., 43d mtg. (1978), 9 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 116 [hereinafter cited as OFF. REC.].

<sup>26</sup> See the detailed lists and records provided by 1983 FAIRPLAY WORLD SHIPPING Y.B. 77-78; 1981 LLOYD'S REGISTER OF SHIPPING 156-57; 1982 THE BULK-CARRIER REGISTER 77; 1983 THE TANKER REGISTER 157.

<sup>27</sup> *Las 25 Flotas pesqueras más importantes del mundo*, MAR Y PESCA, No. 207, 1982, at 44.

1970s, Cuba's tuna-fishing activities in U.S. waters became a point of contention between Cuba and the United States, leading to the negotiation of an important fishing agreement in 1977.<sup>28</sup>

The growing Cuban Navy and its needs also figured prominently in Cuba's policy on the law of the sea. With 3 modern attack submarines, a frigate, 13 large surface-offensive patrol boats, 48 fast-attack missile and torpedo crafts, and numerous other patrol and naval support ships, the navy had become by 1981 a major force in the Caribbean capable of playing a significant support role for the USSR in the event of a U.S.-Soviet military conflict.<sup>29</sup> This potential role is the more critical given Cuba's strategic position astride the Yucatán and Florida Straits, through which over 60 percent of U.S. oil imports pass on their way to ports in the Gulf of Mexico.<sup>30</sup>

The navy has been developed in consonance with Soviet Admiral Gorshkov's "sea-denial" strategy. Given the superiority of U.S. naval firepower, the Cuban Navy has been designed to operate mostly near coastal waters; but it has a high degree of mobility that would enable it in wartime to move quickly towards any of the six strategic straits, where it would carry out attack, interdiction and harassment missions against American shipping.<sup>31</sup> The navy's offensive capabilities also enable it to provide rear support for more extensive offensive missions by Soviet naval forces, as was illustrated by the joint Cuban-Soviet naval maneuvers of November 1982-February 1983.<sup>32</sup> A Soviet naval squadron including a guided missile cruiser, a frigate and a submarine came to within 50 miles of the American coast in the Mississippi Delta, where it simulated a direct naval confrontation. Meanwhile, Cuban naval units remained as a rear guard deployed for antishipping sorties, a role made possible by the geographic position of the Caribbean as a "semi-enclosed" area of narrow seas and straits where relatively small forces can concentrate on controlling choke points. Similar maneuvers took place in the spring of 1984.<sup>33</sup> Submarines are another important component of "sea-denial" strategy, and Cuba's three Foxtrot-class units enhance the navy's

<sup>28</sup> Agreement Between the Government of the United States of America and the Government of the Republic of Cuba Concerning Fisheries off the Coasts of the United States, Apr. 27, 1977, 28 UST 6769, TIAS No. 8689. The text can be found in 9 NEW DIRECTIONS IN THE LAW OF THE SEA 251 (M. Nordquist, S. H. Lay & K. Simmonds eds. 1980).

<sup>29</sup> See CUBAN ARMED FORCES, *supra* note 13. See also 1983-84 JANE'S FIGHTING SHIPS 113-16.

The Navy is the smallest of the three services, but with an adequate budget and Soviet assistance in training, must be assessed as having a reasonable level of tactical and material efficiency. The addition of a submarine branch, a frigate, hydrofoils and the first effective MCM forces is taking this fleet into a new league.

*Id.* at 113.

<sup>30</sup> Ashby, *Grenada: Threat to America's Caribbean Oil Routes*, 65 NAT'L DEF., No. 65, 1981, at 52.

<sup>31</sup> CUBA IN THE WORLD, *supra* note 6, at 80.

<sup>32</sup> *Soviet Ships Came Close by*, *Navy Says*, N.Y. Times, Feb. 15, 1983, at A3, col. 1.

<sup>33</sup> *Soviet, Cuban Ships Come Unusually Close to the U.S. Gulf Coast During Maneuvers*, Wall St. J., Apr. 10, 1984, at 2, col. 3.

ability to interdict shipping in the deeper territorial sea and economic zones around the Florida Straits and the American naval base at Guantánamo.<sup>34</sup>

### CUBA'S POSITIONS ON THE LAW OF THE SEA

#### *Territorial Sea*

By 1970, only 20 countries, including Cuba, maintained 3-mile territorial sea claims.<sup>35</sup> Cuba's position in the Caribbean and the geographical features of its north coasts (which give them a certain resemblance to the Norwegian *skjaergaard* and make it very difficult to draw baselines) traditionally had impelled the Cubans to support the 3-mile limit as a sensible jurisdictional boundary suited to the enforcement capabilities of the once small Cuban Navy. Moreover, the 3-mile limit kept the navigation lanes around Cuba open for Cuban shipping. By 1974, however, the Cubans had altered their position, largely out of deference to the Soviet Union, which was an outspoken advocate at the conference for a 12-mile territorial sea regime. They also wished to show support for Latin American countries, most of which wanted a 200-mile "patrimonial" sea over which coastal states would exercise sovereignty and jurisdiction.<sup>36</sup>

Indeed, at UNCLOS III Cuba played a leading role in attempting to reconcile the Soviet and Latin American positions, while furthering its own interests. In an important speech given before the plenary session of July 4, 1974, the head of the Cuban delegation, Pelegrín Torras de la Luz, outlined a formula, foreshadowed by the Santo Domingo declaration of 1972, that would bridge the gap between the USSR's desire for a 12-mile territorial sea and the Latin Americans' notion of a 200-mile "patrimonial sea." Cuba's support for a 200-mile zone under the sovereignty and jurisdiction of coastal states, he said, "was dictated by the principle of solidarity with Latin American countries, such as Peru and Ecuador, which were firmly defending their right to sovereignty over their natural resources against imperialism." Such a zone, however, was compatible with "the need to respect freedom of nav-

<sup>34</sup> JANE'S FIGHTING SHIPS, *supra* note 29, at 113. With regard to the U.S. naval base at Guantánamo, see generally Bender, *Guantánamo: Its Political, Military, and Legal Status*, 19 CARIBBEAN Q. 80 (1973); Scheina, *The U.S. Presence in Guantánamo*, 4 SOC. RESEARCH 81 (1976).

<sup>35</sup> Bravo & Setién, *supra* note 5, at 90.

<sup>36</sup> The Cuban Government repeatedly drew attention to the link between Cuba's changed position and that of Latin American states. See, e.g., *Continúa sus sesiones la Tercera Conferencia sobre el Derecho del Mar*, Granma, Apr. 23, 1975, at 6; *Comienza hoy, en las NN.UU., importante reunión sobre derecho marítimo*, Granma, Mar. 15, 1976, at 7. For the perspectives and policies of Latin American states towards the law of the sea, see generally A. LUNA TOBAR, *LA DOCTRINA MARÍTIMA LATINOAMERICANA* (1972); E. VARGAS-CARREÑO, *AMERICA LATINA Y LOS PROBLEMAS CONTEMPORÁNEOS DEL DERECHO DEL MAR* (1973); R. ZACKLIN, *THE CHANGING LAW OF THE SEA: WESTERN HEMISPHERE PERSPECTIVES* (1974); A. SILENZI DE STAGNI, *EL NUEVO DERECHO DEL MAR: CONTROVERSIAS ENTRE LAS POTENCIAS NAVALES Y EL TERCER MUNDO* (1976); Galindo Pohl, *Latin America's Influence and its Role in the Third Conference on the Law of the Sea*, 7 OCEAN DEV. & INT'L L. 65 (1979); Morris & Simoes Ferreira, *Latin America, Africa, and the Third United Nations Conference on the Law of the Sea: Annotated Bibliography*, 9 OCEAN DEV. & INT'L L. 101 (1981).



igation and other traditional freedoms." At a Second Committee meeting in August, Cuban delegate Rabaza took up the same theme and argued that the concepts of a 12-mile territorial sea and a 200-mile economic zone could be harmonized. It should be possible, he urged his colleagues, to agree on the various prerogatives or "competences" of sovereignty and jurisdiction that states would be free to exercise in each of the areas.<sup>37</sup>

Meanwhile, at an earlier meeting of the Second Committee on July 16, Rabaza had argued on behalf of the concept of establishing regional arrangements for fishing in areas where the 200-mile economic zones of different states overlap. He also said that

many coastal States would not be able fully to exploit the fish resources in their zone and should therefore allow other States to enter the area . . . with priority given to the developing countries, particularly those that are land-locked and *geographically disadvantaged*, and to States to whose economy fishing was *absolutely essential*.<sup>38</sup>

Clearly, by 1974 Cuba's expanding fishing fleet was making its presence felt in waters beyond the Caribbean, and the Cubans were looking to the future. In the context of the growing consensus at the conference on the territorial sea and economic zones, they wanted some recognition of their ability to harvest tuna and anadromous fish, none of which are found in Cuba's territorial waters, in those areas where the economic zone of the United States overlaps with Cuba's, as well as in other economic zones around the world.

Through a legislative decree of February 24, 1977, Cuba extended its former 3-mile territorial jurisdiction to 12 miles, and today it is one of more than 80 states that have adopted the 12-mile delimitation indicated in Article 3 of the Convention.<sup>39</sup> Cuba also enforces a strict innocent passage rule allowing foreign ships to enter into and exit from its territorial sea so long as such use does not interfere with Cuba's military, police, customs and fishing rules. Cuba developed its position on innocent passage at UNCLOS III through close consultation with other states, especially the African bloc, whose stance on this issue happened to coincide with Cuba's own interests.<sup>40</sup>

### *International Straits and the High Seas*

There are at least 120 straits in the world 24 miles in width, or less.<sup>41</sup> Thus, the universal establishment of 12 miles as the breadth of the territorial

<sup>37</sup> SR 29th plen. mtg. (1974), 1 OFF. REC. at 115 (Torras de la Luz); 2 *id.* at 192 (Rabaza).

<sup>38</sup> SR Comm.2, 4th mtg. (1974), 2 *id.* at 104 (emphasis added).

<sup>39</sup> Act of Feb. 24, 1977 Concerning the Breadth of the Territorial Sea of the Republic of Cuba, Decree No. 1, Gaceta Oficial (Cuba), No. 6, Feb. 26, 1977, at 15, *reprinted in* 7 NEW DIRECTIONS IN THE LAW OF THE SEA 23 (M. Nordquist, S. H. Lay & K. Simmonds eds. 1980) (trans. UN Secretariat).

<sup>40</sup> Bravo & Setién, *supra* note 5, at 70-71; Stevenson & Oxman, *Preparations*, *supra* note 4, at 3-4. See also Declaration of the Organization of African Unity on the Issues of the Law of the Sea, UN Doc. A/CONF.62/33 (1974), 2 OFF. REC. at 63.

<sup>41</sup> J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 183 (2d ed. 1981).

sea would have placed the waters in all such straits under the national jurisdiction of bordering states, subject only to a right of innocent passage. Although many of these straits are not important for international traffic, others are essential for international maritime commerce and deployment of naval power.<sup>42</sup> The growth of Cuba's merchant and fishing fleets, and the status of the USSR as one of the world's leading naval powers impelled Cuba to support actively the adoption of a right of transit passage for all aircraft and vessels, including warships and submerged submarines, in straits used for international navigation.<sup>43</sup> This position was to some extent a diplomatic liability for Cuba, as it ran counter to the stance taken throughout the early stages of UNCLOS III by many Third World countries. Most of them considered the U.S. and Soviet proposals for transit passage intrusive encroachments on the rights of smaller coastal states, and they thought that transit passage would accentuate the large military and economic disparities between the superpowers and the weaker nations.<sup>44</sup>

It was to Cuba's advantage not to be perceived as favoring a position supported by the great powers, but to be seen instead as one of the weak nations championing their cause. Thus, rather than emphasizing the worldwide expansion of its commercial fleets and its close military association with the Soviet Union, Cuba skillfully exploited the UNCLOS debates on transit passage to stress its independence from the United States and to cast the latter in the role of an imperialist aggressor bent on extending its hegemony over smaller powers throughout the Third World. In his plenary statement at Caracas in 1974, Cuban representative Torras de la Luz noted that the straits problem was one of "vital importance," and that the "aggressive" capability of the United States to close down straits to "friendly and socialist" shipping called for a legal regime of unrestricted passage.<sup>45</sup> Cuba could not allow itself to be absorbed into the American *mare nostrum*, the Caribbean.<sup>46</sup>

At a later debate in the Second Committee, the Cuban delegate returned to this theme; an innocent passage regime alone would be insufficient to protect Cuba against the ever present American threat.<sup>47</sup> Cuba was especially concerned about the U.S. ability to interfere with Cuban commerce, or Soviet shipments to Cuba, through the important Leeward Islands strait in the eastern Caribbean (16 miles wide) and the Nicholas strait between Cuba and the Bahamas (24 miles wide).<sup>48</sup> Cuba used similar arguments to support the Soviet Union's position in favor of the freedoms of the high seas.

<sup>42</sup> Pirtle, *Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate" Revisited*, 5 OCEAN DEV. & INT'L L. 477 (1978).

<sup>43</sup> *Fija Cuba su posición sobre los archipiélagos en la Conferencia de la ONU sobre Derecho del Mar*, Granma, Aug. 14, 1974, at 5.

<sup>44</sup> Pirtle, *supra* note 42; Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AJIL 77 (1980).

<sup>45</sup> SR 29th plen. mtg. (1974), 1 OFF. REC. at 116. See also *Reanudó sus labores la III Conferencia del Mar después del receso por la muerte de Perón*, Granma, July 3, 1974, at 8; *Expone Pelegrín Torras ante la III Conferencia del Mar, en Caracas, temas de Cuba en cuanto al paso por los estrechos marítimos*, Granma, July 24, 1974, at 7.

<sup>46</sup> SR 29th plen. mtg. (1974), 1 OFF. REC. at 116.

<sup>47</sup> SR Comm.2, 12th mtg. (1974), 2 OFF. REC. at 127.

<sup>48</sup> SR 29th plen. mtg. (1974), 1 *id.* at 116; SR Comm.2, 37th mtg. (1974), 2 *id.* at 268-69.

*Exclusive Economic Zone*

The concept of a zone extending beyond territorial waters in which coastal states would exercise exclusive jurisdiction over living and nonliving resources first developed in Latin America during the early part of this century.<sup>49</sup> Three years before the first session of UNCLOS III was convened, several Latin American countries issued the 1970 Declaration of Montevideo on the Law of the Sea and the 1970 Lima Declaration of Latin American States on the Law of the Sea, proclaiming the right to establish zones of sovereignty and jurisdiction over marine resources. The Santo Domingo declaration of 1972 further refined the position of many Latin American states by advocating a 12-mile territorial sea and a 200-mile "patrimonial sea" within which coastal states would have sovereignty over all resources and jurisdiction over scientific research and marine pollution.<sup>50</sup> Foreign states were to retain the traditional freedoms of navigation, overflight and the laying of submarine cables and pipelines in the zone of the patrimonial sea.

In its Declaration on the Issues of the Law of the Sea of May 1973, the Organization of African Unity adopted a position similar to that of the Santo Domingo declaration, reflecting the emerging consensus throughout the Third World on the desirability of the concept of an exclusive economic zone (EEZ).<sup>51</sup> At the Caracas session of UNCLOS III (June 10–August 29, 1974), Cuba was among the more than one hundred states that supported the concept.<sup>52</sup> Given Cuba's political sympathies with the Third World, its growing rapprochement at that time with Latin America and its eagerness to exploit the economic resources of the Caribbean, its stance is understandable.

At the debates on the economic zone in the Second Committee, Cuban delegate Rabaza urged the creation of regional fishing commissions to assist in regulating fishing activities in areas of overlapping EEZ jurisdictions.<sup>53</sup> Cuba feared that by entering into bilateral negotiations with the United States to delimit their respective rights in such areas, Cuba, as the weaker power, would have to make important political concessions to the United States in return for American cooperation on economic issues related to

<sup>49</sup> For a comprehensive history of the development of the concept of the exclusive economic zone, see W. EXTAVOUR, *THE EXCLUSIVE ECONOMIC ZONE* (2d ed. 1978); Coquia, *Development and Significance of the 200-Mile Exclusive Economic Zone*, 54 PHIL. L.J. 440 (1979); Krueger & Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 321 (1979); Okidi, *The Role of the OAU Member States in the Evolution of the Concept of the Exclusive Economic Zone in the Law of the Sea: The First Phase*, 7 DALHOUSIE L.J. 39 (1982).

<sup>50</sup> See *supra* note 24.

<sup>51</sup> Organization of African Unity: Declaration on the Issues of the Law of the Sea, UN Doc. A/AC.138/89, 28 UN GAOR Supp. (No. 21, vol. 2) at 4, UN Doc. A/9021, vol. 2 (1973), reprinted in 12 ILM 1200 (1973).

<sup>52</sup> Alexander & Hodgson, *The Impact of the 200-Mile Economic Zone on the Law of the Sea*, 12 SAN DIEGO L. REV. 569, 570 (1975).

<sup>53</sup> SR Comm.2, 24th mtg. (1974), 2 OFF. REC. at 192; *Inicia Conferencia sobre Derecho del Mar el debate de los temas de fondo*, Granma, July 17, 1974, at 8. See also statement by Cuban delegate Torras de la Luz, SR 135th plen. mtg. (1980), 14 OFF. REC. at 29.

EEZ exploitation. Regional arrangements, on the other hand, would permit Cuba to wield considerable influence, especially given its preponderance relative to most other Caribbean states,<sup>54</sup> and to gain significant advantages without having to make any political concessions or sacrifice the valuable Soviet connection.

A similar kind of political calculus shaped Cuba's legal position on the issue of enclosed and semi-enclosed areas. Located in the midst of one of the two most complex areas of this type (the other being the Sea of Japan), Cuba strongly voiced its support for Trinidad and Tobago's proposal to create regional and subregional working groups among states to encourage cooperation in semi-enclosed areas.<sup>55</sup> Cuba also urged the adoption of the proposal made by the Group of 77 to create regional arrangements that would permit the use of national economic zones by geographically and economically disadvantaged states. Both Torras de la Luz at the Plenary and Rabaza at the Second Committee shrewdly argued that Cuba was geographically disadvantaged owing to its "hemmed-in" location in the narrow northern neck of the Caribbean amid large, hostile concentrations of American military and naval power and coercive economic activities.<sup>56</sup> This particular argument, however, did not carry the day, even within the Soviet-Eastern European bloc. The consensus among these states was that Cuba was "neither disadvantaged nor advantaged."<sup>57</sup> This subtle diplomatic slap on the Cubans' wrist could well have reflected the mounting frustration of the Soviet bloc with Cuba's economic problems and its fear that assent to Cuba's designation as a disadvantaged state could serve as a precedent for further Cuban requests for larger economic subsidies.

Cuba's continental shelf is of great economic value, as illustrated by the extensive activities of the Cuban lobster industry in the southern portion of the shelf.<sup>58</sup> Since the shelf is small, however, and is covered by the 200-mile exclusive economic zone, Cuba centered its diplomatic efforts on this topic mainly on the issue of dispute settlement among conflicting continental shelf claims. Again, the Cubans noted their preference for regional arrangements to reconcile such claims, as advocated by the African bloc, instead of either third-party arbitration or case-by-case resolution through bilateral negotiations. As late as 1980, Cuba was opposing strenuously any proposals for establishing binding, third-party arbitration as the instrument for resolving disputes over continental shelf claims.<sup>59</sup> In fact, in line with the positions of the socialist bloc and much of the Third World, Cuba consistently rejected the idea of compulsory jurisdiction of the International Court of Justice on

<sup>54</sup> See generally Marcella, *Cuba and the Regional Balance of Power*, PARAMETERS, No. 2, 1977, at 11; CUBAN ARMED FORCES, *supra* note 13, at 5.

<sup>55</sup> SR 29th plen. mtg. (1974), 1 OFF. REC. at 116.

<sup>56</sup> *Id.*; SR Comm.2, 32d mtg. (1974), 2 *id.* at 242.

<sup>57</sup> Symonides, *Geographically Disadvantaged States and the New Law of the Sea*, 8 POLISH Y.B. INT'L L. 55, 57 (1976).

<sup>58</sup> Morales, *Las Capturas de langostas en Cuba en el período 1955-1980*, MAR Y PESCA, No. 199, 1982, at 25; Bravo & Setién, *supra* note 5, at 71.

<sup>59</sup> SR 135th plen. mtg. (1980), 14 OFF. REC. at 29.

any law of the sea issues, and endorsed compulsory conciliation but not compulsory arbitration of disputes.<sup>60</sup>

The debates on the continental shelf also provided Cuba with opportunities to score some diplomatic and political victories against the United States. Cuba cosponsored a resolution stating that "[n]o State shall be entitled to construct, maintain, deploy or operate on or over the continental shelf of another State any military installations or devices or any other installations for whatever purposes without the consent of the coastal State."<sup>61</sup> The Cuban delegation skillfully exploited the moral support of many Third World states for the resolution by drawing attention to the allegedly illegal American "colonial" occupations of Puerto Rico and Guantánamo and the large U.S. military forces stationed there, which, according to Cuban delegate Rabaza, constituted violations of the sovereign rights of nations. Rabaza described the American naval base at Guantánamo as "a dagger threatening the country's sovereignty."<sup>62</sup>

On February 24, 1977, at the same time it established its 12-mile territorial sea, Cuba, which until that point had not claimed an exclusive economic zone, announced the creation of one "extending up to a distance of 200 nautical miles measured from the baseline from which the breadth of the territorial sea is measured."<sup>63</sup> The Cuban zone overlapped with resource zones of other states, including the United States, Mexico, Jamaica, the Bahamas and Haiti. In that same legislative decree, Fidel Castro, in his official capacity as President of Cuba, noted that "the Cuban State shall respect the equal rights of contiguous States to their respective economic zones and declares that it is prepared to undertake bilateral negotiations on the conflicts of law that may result from the application of those principles."<sup>64</sup> In fact, during the previous year the Cuban Government, encouraged by the temporary thaw in U.S.-Cuban relations during the last year of the Ford administration and the opening of the Carter administration, had been feverishly pursuing bilateral negotiations with the United States to regulate fishing in those waters where the resource zones of both countries overlapped. On

<sup>60</sup> *Id.*; SR 61st plen. mtg. (1976), 5 *id.* at 34-35. Cuban delegate D'Stefano Pissani explained that

[m]any of the reasons advanced for rejecting the compulsory jurisdiction of the International Court of Justice were still valid; it was a fact that some countries still believed that the function of international law was to protect certain interests—in other words, the *status quo*. In addition, the advocates of an optional clause with regard to acceptance of the Court's jurisdiction ignored the fact that not only had very few States accepted Article 36 of the Court's Statute, but those which had made such reservations . . . as to render the article almost meaningless.

*Id.* at 35. See also Adede, *Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention*, 11 OCEAN DEV. & INT'L L. 125, 129 (1982).

<sup>61</sup> UN Doc. A/CONF.62/C.2/L.42/Rev.1 (1974), 3 OFF. REC. at 220.

<sup>62</sup> SR Comm.2, 39th mtg. (1974), 2 *id.* at 279-80.

<sup>63</sup> Act of Feb. 24, 1977 Concerning the Establishment of an Economic Zone, Decree No. 2, Gaceta Oficial (Cuba), No. 6, Feb. 26, 1977, at 18, reprinted in 7 NEW DIRECTIONS, *supra* note 39, at 385 (trans. UN Secretariat).

<sup>64</sup> *Id.*

April 27, 1977, Cuba and the United States signed in Havana an agreement concerning fisheries off the coasts of the United States.<sup>65</sup>

At UNCLOS III, the Cubans repeatedly had expressed their preference for regional arrangements over bilateral ones for resolving conflicting EEZ or continental shelf claims. And just as frequently, they had made ample political capital out of the supposed American threat to their military and economic security. Yet, when it became obvious that they would have to resort to bilateral diplomacy to secure American acquiescence in their extensive fishing activities off the U.S. coasts, they did not hesitate to tone down their anti-American rhetoric, at least outside the conference, and reach a pragmatic agreement that turned out to be highly advantageous to Cuba. At that time, the Carter administration hoped to involve Cuba gradually in a web of profitable functional links with the United States that would lessen Cuba's dependence on the Soviet bloc and serve as the basis for persuading the Cubans to adjust their international political alignments closer to the goals of American foreign policy. So, in return for a fishing agreement that was tilted markedly in favor of Cuba's economic interests, Cuba did not have to make any significant political concessions to the United States, as it had feared it would earlier. As a result of the unexpected deterioration in U.S.-Cuban relations by 1979-1980, however, the agreement was never implemented by the U.S. Government.

Cuba's establishment of an exclusive economic zone in 1977 was part of a wider trend throughout Latin America. Other states that took similar steps around the same time included Guatemala (1976), the Dominican Republic (1977), Haiti (1977), Guyana (1977), the Bahamas (1977) and Venezuela (1978).<sup>66</sup>

#### *Seabed Mining and the Area*

This was perhaps the most controversial topic at UNCLOS III, and one in which the states associated with the Group of 77 invested the greatest political effort to secure the adoption of legal rules suitable to their economic interests.<sup>67</sup> Generally, the Group of 77 wanted to regulate seabed mining so as to give less developed countries access to seabed mining technology, and it wanted to tax the profits of transnational corporations involved in mining for the purpose of distributing such funds among the developing countries. Those countries in the Group of 77 that were mineral exporters also called for controls on the amount of various minerals that could be extracted from the seabed within a given period of time. They feared that

<sup>65</sup> Agreement, *supra* note 28.

<sup>66</sup> Nweihed, *EZ (Uneasy) Delimitation in the Semi-enclosed Caribbean Sea: Recent Agreements between Venezuela and her Neighbors*, 8 OCEAN DEV. & INT'L L. 3 (1980).

<sup>67</sup> See generally LAW OF THE SEA: U.S. POLICY DILEMMA (B. Oxman, D. Caron & C. Buderl eds. 1983); Friedman & Williams, *The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea*, 16 SAN DIEGO L. REV. 555 (1979); Adede, *The Group of 77 and the Establishment of the International Seabed Authority*, 7 OCEAN DEV. & INT'L L. 31 (1979).

without such controls on extraction and production, world prices would drop, which would cause considerable damage to their economies.

Price stabilization was particularly important to Cuba, especially with regard to nickel, cobalt and manganese.<sup>68</sup> Cuba is the world's fourth largest producer of nickel (next to Canada, New Caledonia and the USSR). Cobalt is an important by-product of nickel extraction, and during the 1970s became highly prized as a strategic mineral. Cuba also has considerable deposits of manganese located off Santiago, near Guantánamo, which in the late 1970s the Cubans began to prepare to exploit with technical assistance from the Soviet Union and several Western states. As late as 1980, representative Torras de la Luz kept stressing Cuba's concern that unrestricted mineral extraction from the seabed would lead to depressed world prices and leave Cuba, as in the case of sugar (its most important export commodity), at the mercy of an international economic order geared to serve the interests of the powerful capitalist industrialized states.<sup>69</sup>

The instrument advocated by Cuba and the Group of 77 to achieve their objective was a strong International Sea-Bed Authority that would regulate all seabed mining activities, set production quotas, grant licenses to mining companies, tax their profits and have access to their technology.<sup>70</sup> The Authority would be under the control, not of a Council as advocated by the United States, but of an Assembly on which all signatories of the Convention would be represented. Naturally, the Group of 77 would be in the majority at the Assembly and would be able to control the Authority in accordance with its interests. Cuba vigorously urged that full authority be given to the International Sea-Bed Authority over all questions of seabed mining, and expressed its suspicion toward any proposals that would have given a decision-making role or even a limited degree of influence in the Authority to transnational corporations involved in seabed mining. Cuba saw the latter as the quintessential "tool of the imperialists" designed to hinder "sovereign economic development."<sup>71</sup>

Indeed, Cuba consistently used the extensive debates on these issues at the conference to keep the United States on the defensive diplomatically and politically from 1974 to 1981. In the summer of 1980, for example, in the aftermath of the U.S.-Soviet crisis over the presence in Cuba of a Soviet combat brigade and the "Mariel" exodus of over 100,000 Cubans to the United States in a month, Cuba accused the United States at UNCLOS III of planning to implement a mini-regime among capitalist states to carry out seabed mining in disregard of whatever rules the conference established.<sup>72</sup> Similar attacks against the United States repeatedly appeared in the state-controlled Cuban newspapers and on the worldwide Cuban international

<sup>68</sup> See statement by Cuban delegate Torras de la Luz, SR 135th plen. mtg. (1980), 14 OFF. REC. at 29.

<sup>69</sup> *Id.*

<sup>70</sup> Adede, *supra* note 67, at 31.

<sup>71</sup> SR 29th plen. mtg. (1974), 1 OFF. REC. at 115; SR Comm.1, 4th mtg. (1974), 2 *id.* at 13-14.

<sup>72</sup> SR 130th plen. mtg. (1980), 14 *id.* at 6.

broadcasting service.<sup>73</sup> Cuba also warned the conference against legislation by the United States or West Germany allowing their nationals to exploit the seabed outside the Convention regime; such legislation would present the International Sea-Bed Authority with a "fait accompli" and frustrate one of the central purposes of the Convention.<sup>74</sup>

Cuba's harsh anti-American rhetoric stood out even among those Third World states that were highly critical of the United States. It was, in fact, harsher than Cuba's important interests in the issue of seabed mining dictated. From the viewpoint of a functional analysis, the Cubans would have been expected to take a more conciliatory line, seeking to entice the United States into a global seabed mining regime. After all, given Cuba's own warnings about the disproportionate economic and military power of the United States, the Cubans were under no illusions about U.S. abilities to exploit the resources of the seabed outside the UNCLOS regime. Yet it almost seemed as if the Cubans were secretly glad to see the United States reject the seabed mining portions of the treaty—at considerable functional costs to Cuba and the Group of 77—so as to validate Cuba's ideological attacks against the United States. Cuba's strong opposition to the multinational corporations reveals in a similar way the limitations of a functional analysis. The multinationals included mining companies whose technological support Cuba would have found highly valuable for exploiting its own mineral resources on land and in its economic zone.

#### *Marine Environment, Scientific Research and Technology Transfer*

Up to 1974, Cuba had no meaningful policy on the marine environment or fishing conservation and regulation, aside from recurrent attacks on the United States for its alleged interference with Cuban fishing activities on the high seas.<sup>75</sup> The Cuban Government seems to have waited expectantly for some consensus position to emerge from the 1974 Caracas session of UNCLOS III that it could support. After the Caribbean states of Barbados and Trinidad and Tobago proposed the formation of regional groups for coordinating fishing policy, Cuba seized upon the idea. It supported the movement for an East Central Atlantic Authority, joined a number of African and European states in a proposal to set up a similar body to regulate fishing in the Southeast Atlantic and tried to change technical rules in the North Atlantic to allow the growing Cuban fleet to fish there.<sup>76</sup>

<sup>73</sup> *Dudan que EE.UU. apruebe Convención actual sobre derecho del mar*, Granma, Aug. 29, 1981, at 7; *Culpan a EE.UU. por el fracaso de conversaciones en la Conferencia de la ONU sobre Derecho del Mar*, Granma, Aug. 27, 1981, at 6; *Acusan a EE.UU. de bloquear la Conferencia sobre el Mar*, Granma, Aug. 19, 1981, at 6; *Torpedea EE.UU. la Conferencia sobre Derecho del Mar*, Granma, Aug. 11, 1981, at 5; *Denuncia el Canciller de Venezuela presiones para frustrar reunión del mar*, Granma, Apr. 10, 1978, at 6; *Prepárase ya, EE.UU., para explotar unilateralmente las riquezas del fondo marino sin esperar acuerdo internacional*, Granma, Mar. 29, 1978, at 6.

<sup>74</sup> SR 130th plen. mtg. (1980), *supra* note 72; SR 135th plen. mtg. (1980), *supra* note 68.

<sup>75</sup> Bravo & Setién, *supra* note 5, at 99.

<sup>76</sup> See generally Miles, *Changes in the Law of the Sea: Impact on International Fisheries Organizations*, 4 OCEAN DEV. & INT'L L. 411, 421, 428 (1977); Taitt, *The Exclusive Economic Zone: A Caribbean Community Perspective*, 7 W. INDIAN L.J. 36 (1983).



Cuba wanted to secure for its fishing fleet in waters far from its shores the greatest possible access and frequency of visits. Well into the 1974 Caracas session, Torras de la Luz outlined a five-point plan for managing fisheries that was well suited to Cuba's status as a small developing country with one of the world's largest fishing fleets: (1) scientific determination of the maximum total allowable catch in a particular area; (2) payment of "reasonable" duties to coastal states for fishing licenses, such licenses to be granted on a nondiscriminatory basis; (3) preferential treatment in the granting of licenses and allocation of quotas to developing countries; (4) joint exploitation of fishing resources in a particular area among developing countries; and (5) "equitable participation of the economically under-developed countries in the exploitation of the resources available *after the previous preferences had been met.*"<sup>77</sup>

In 1978 Cuba further clarified its policy on the marine environment by joining in the debate on pollution emanating from vessels. Although Cuba agreed with Barbados that rules for vessel pollution control should not be so strict as to impede economic development, they could not be so lax as to permit the long-term deterioration of fishing banks for the sake of short-term gains in shipping activity.<sup>78</sup> Cuba had to balance the benefits to its economy of its fishing fleet and tourist industry against those of trade and its heavy oil imports from the Soviet Union, a balance that resulted in a moderate policy on the marine environment.

Out of the desire to profit from the intense marine research activities carried out by U.S. vessels in the Caribbean waters around Cuba, Cuba supported in 1976 the compromise formula proposed by Bulgaria, which quickly gained acceptance among the socialist bloc and the Group of 77.<sup>79</sup> This formula, eventually codified in Articles 238, 246 and 249 of the Convention, provides that the fruits of scientific research carried out in the exclusive economic zone shall be made available to the coastal state. Moreover, the Cubans warmly endorsed the provision codified in Article 249(1)(a), which ensures "the right of the coastal State, if it so desires, to participate or be represented in the marine scientific research project, especially on board research vessels . . . without obligation to contribute towards the costs of the project." Throughout the conference, Cuba had complained repeatedly about the alleged illegal activities of the U.S. Government, especially the Central Intelligence Agency, in using scientific research vessels near Cuban territorial waters to gather intelligence and land parties of Cuban exiles on the island to act as CIA agents, carrying out acts of subversion and sabotage. Besides making ample political capital out of these allegations, the

<sup>77</sup> SR 29th plen. mtg. (1974), 1 OFF. REC. at 115 (emphasis added); *La III Conferencia de la ONU sobre el Derecho del Mar*, Granma, Aug. 14, 1974, at 5.

<sup>78</sup> SR Comm.3, 35th mtg. (1978), 9 OFF. REC. at 148 (1978 plan for vessel-source pollution). For other Cuban statements on marine environmental issues, see SR 29th plen. mtg. (1974), 1 *id.* at 115; SR Comm.3, 33d mtg. (1976), 6 *id.* at 111; SR Comm.3, 40th mtg. (1979), 11 *id.* at 71; Herrera-Moreno, *La Contaminación del mar*, MAR Y PESCA, No. 203, 1982, at 36; *Comenzó en Ginebra la Conferencia sobre Derecho del Mar*, Granma, Mar. 18, 1975, at 6.

<sup>79</sup> SR Comm.3, 30th mtg. (1976), 6 OFF. REC. at 98.

Cubans perceived Article 249(1)(a) as adequate to address their concerns in the future. Cuba also strongly supported Articles 266–278 of the Convention, which provide for the transfer of marine technology to developing states through the institutional mechanisms of the International Sea-Bed Authority and other international organizations.

#### CONCLUSION

One of the original signatories of the Convention, Cuba ratified it on August 15, 1984. The Convention serves Cuban economic and military interests well, and Cuba can be expected generally to abide by it. One also can predict that at every forum of multilateral diplomacy in which it participates, Cuba will continue to raise the issue of the U.S. refusal to sign and American plans to exploit the seabed outside the Convention regime. Thus, for the foreseeable future, the Convention will be one of many valuable instruments in Cuba's diplomacy. This will be true not only because of the functional aspects of the Convention, but also because of its important political and ideological implications as perceived by Cuba.

Besides serving as a case study of the rich inner dynamics of UNCLOS III, an analysis of Cuba's policy towards the law of the sea yields four general observations concerning major trends in international law and politics today. First, Cuba's behavior reveals the union of law and power, the skillful elaboration of international legal rules to serve state interests that is characteristic of contemporary statecraft. Cuban policy took UNCLOS III and its resultant Convention seriously, and Cuban diplomacy succeeded through UNCLOS III in securing many of its law of the sea objectives, as well as other political, economic and military goals.

Second, Cuban diplomacy reveals the balancing of state interests required of any state that wishes to play an active role in the international system and in the elaboration of its rules of conduct as embodied in international law and state practice. Cuba had to weigh carefully its own interests versus those of its Soviet bloc allies. Such a calculation also had to include the interests of the Third World with which Cuba seeks to maintain vigorous political and ideological ties. Whenever the positions of the Soviet bloc clashed with those of other groups on issues of critical importance to the USSR, Cuba generally followed the Soviet line. Cuba, however, had ample scope to support Latin America as well as the Group of 77 in advancing certain of their objectives that, while not parallel to the goals of the Soviet bloc, were not of vital concern to the latter. Throughout this complex balancing act, there was a common thread that gave Cuban diplomacy a sense of cohesiveness: a sustained opposition to, and determined effort to frustrate, the objectives of American foreign policy, except for those rare occasions when they happened to coincide with the USSR's, as was the case with the regimes of transit passage and the high seas. Even on these issues, however, Cuba managed to justify legal stances similar to those of the United States in terms of anti-American arguments.

Third, rhetoric and the fusion of ideology with law play an important role in the development of international legal rules and principles. Cuba's

anti-American rhetoric throughout the conference illustrates this observation. It was not simply that Cuba's highly ideological, confrontational rhetoric provided a cover for its cynical pursuit of *realpolitik*. While this was true to some extent, it is important to realize that Cuba also took ideology and international morality seriously. It perceived its ideological attacks against the United States, and its casting of the United States as a dangerous, immoral superpower, as an essential part of its earnest effort to put the United States on the defensive internationally. Cuba considered this a critical step in reaching its goal of securing a degree of international respectability, strengthening its claims to leadership of the nonaligned movement and turning the tables on American accusations of its adventurism and irresponsible international behavior. Cuba's intense rhetoric and the mutually supporting symbiosis of ideology with law underlying Cuban diplomacy illustrate what Thomas Franck has called "the strategic role of legal principles" in international conduct.<sup>80</sup>

Fourth, Cuba's multilateral diplomacy weakens the hope, prevalent among many theorists of international law and politics during the past two decades, that functionalism will channel the course of international relations along less politicized and ideological lines, leading eventually to political cooperation and integration among states. In fact, contrary to the expectations of functionalist theory, Cuba injected large doses of ideological and political confrontation into issues that lent themselves to functional analysis and solutions, in order to score symbolic ideological and political victories. In the ongoing development of international law in the late 20th century, political objectives and their articulation and justification through ideology and law often exert greater weight in shaping a state's legal positions than the benefits expected as a result of functional cooperation.

<sup>80</sup> Franck, *supra* note 3, at 109.

## THE RETURN OF HUMPTY-DUMPTY: FOREIGN RELATIONS LAW AFTER THE CHADHA CASE

*By Thomas M. Franck and Clifford A. Bob\**

Words mean whatever I say they mean, Humpty-Dumpty rather grandly explained shortly before his accident. Similarly, statutes, perforce, mean whatever those who implement them say they mean.

In most instances of major dispute over statutory meaning, this is not a problem because interpretation is the business of the courts. The system thus provides umpires who resolve conflicts, dispute by dispute, in a disinterested, rationally enunciated fashion, after hearing principled argument and relevant data. Unfortunately, these same umpires often abdicate when the dispute concerns interpretation of a foreign relations law. As a result, laws intended by Congress to authorize, but also to limit, executive discretion in the conduct of aspects of U.S. foreign policy can come to mean in practice whatever the President, as their executor, says they mean. Yet it is manifestly unsatisfactory for laws, if constitutional and properly enacted, to be no more than "good faith" obligations on those whose conduct the laws purport to regulate.

To deal with this conundrum, Congress has fashioned two makeshift remedies. It has sometimes given legislative authorization only on a case-by-case basis, thereby keeping the President on a very short leash. Or, more commonly in the past four decades, Congress has had recourse to a device known as the "legislative veto." However, the Supreme Court recently held this device unconstitutional.

As a result, Congress may now return to the "short-leash" approach—in many instances an alternative counterproductive to Congress, the Presidency and, above all, the national interest. After examining various other options, this article concludes that meaningful consultation between the branches prior to case-by-case implementation affords the best way to avoid damaging disputes over statutory meaning and encourages delegation broad enough to permit essential flexibility in the conduct of U.S. foreign relations by the President. The authors also propose the adoption of clearly defined standards to guide the process of implementation and urge the courts to rethink their traditional reluctance to serve as umpires in interpreting foreign relations laws where consultation and compromise have failed to reconcile differences that undermine the capacity of the nation to speak with a single, effective voice.

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## I. HELLO, CHADHA; GOOD-BYE, VETO

On June 23, 1983, the Supreme Court upheld the right of Mr. Jagdish Rai Chadha—an East Indian born in Kenya who had stayed in the United States after the expiration of his student visa—to remain permanently in the United States.<sup>1</sup> In order to reach this conclusion, the majority opinion, endorsed by six Justices,<sup>2</sup> effectively dismantled the arch of executive-congressional power sharing that had been built, law by law, over the past half century. The Court did this by removing its capstone, a device known as the “legislative veto.”

Congress, in the words of Gilbert Beaud's plaintive song, is left to ask: “*et maintenant, que vais-je faire?*” Indeed: now what? In our society, which uniquely entrusts many of its most crucial and difficult political decisions to the collegial wisdom of nine appointed judicial “life peers,” the relevant question is not whether this decision is wise, or even whether it was judiciously framed. Rather, we should ask how Congress and the President are to rebuild that essential arch of inter-branch cooperation. Nowhere is that cooperation more essential than in the field of foreign relations.<sup>3</sup>

*The Chadha Case*

In 1973, a year after the expiry of his visa, the Immigration and Naturalization Service, acting in accordance with the Immigration and Nationality Act,<sup>4</sup> began to seek to deport Chadha. During hearings before an immigra-

<sup>1</sup> Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

<sup>2</sup> The majority opinion was written by Chief Justice Burger. Justice Powell concurred on a more limited ground. Justices Rehnquist and White dissented.

<sup>3</sup> Legislative veto provisions occur in 15 major foreign affairs laws, many of which apply the veto in more than one context, *Chadha*, 462 U.S. at 1003-06 (White, J., dissenting) (relying on the brief of Office of Senate Legal Counsel): Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended in scattered sections of 7, 16, 22 and 42 U.S.C.); International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, 89 Stat. 849 (codified as amended in scattered sections of 7 and 22 U.S.C.); National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (codified as amended in scattered sections of 8, 10, 12, 16, 18, 42, 50 and 50 app. U.S.C.) (1976); Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93-155, 87 Stat. 605 (codified as amended in scattered sections of 10, 15, 22, 50 and 50 app. U.S.C.); Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93-365, 88 Stat. 399 (codified as amended in scattered sections of 10 and 50 app. U.S.C.); Export-Import Bank Amendments of 1974, 12 U.S.C. §§82, 635-635g; Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (codified as amended in scattered sections of 19 and 26 U.S.C.); Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended in scattered sections of 19, 26 and 31 U.S.C.); International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. §§2751-2796, 22 U.S.C. §2441 note (1982); International Security Assistance Act of 1977, Pub. L. No. 95-92, 91 Stat. 614 (codified as amended in scattered sections of 22 U.S.C.); Nuclear Non-proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (codified as amended in scattered sections of 22 and 42 U.S.C.); International Navigational Rules Act of 1977, 33 U.S.C. §§1601-1608 (1982); War Powers Resolution, 50 U.S.C. §§1541-1548 (1982); Pub. L. No. 95-223, 91 Stat. 1625 (codified as amended in scattered sections of 50 and 50 app. U.S.C.). For a description of the particular provisions of laws containing legislative vetoes, see *infra* notes 79, 84, 91, 94, 99, 107 and 109.

<sup>4</sup> 8 U.S.C. §§1101-1503 (1982).

tion judge,<sup>5</sup> Chadha petitioned the Attorney General to exercise the discretionary right vested in him by the Act<sup>6</sup> to waive deportation if the alien has been in the country for at least 7 continuous years and is of good moral character, and if deportation would subject the alien to "extreme hardship."<sup>7</sup>

In practice, the Attorney General's discretion is informed by proceedings before the immigration judge, who found in Chadha's favor.<sup>8</sup> As required by the Act, the Government next gave Congress notice of its intent to waive deportation, accompanied by a statement of the facts.<sup>9</sup> On being so notified, either House is authorized by the Act to pass a simple resolution that would have the effect of compelling the Government to reinstitute deportation proceedings.<sup>10</sup> On December 16, 1975, the House passed such a "veto" resolution, acting on a draft prepared by the Chairman of the Judiciary Committee's Subcommittee on Immigration, Citizenship and International Law.<sup>11</sup> It acted by voice vote, without debate—indeed, without the prior printing of the resolution.<sup>12</sup> Chairman Joshua Eilberg did make a brief statement to the effect that Chadha (and five others) had failed to meet the statutory requirement of hardship.<sup>13</sup> While the Senate took no action, the "single-House veto" sufficed to reverse Chadha's prospects.

The Supreme Court, in disallowing this "legislative veto," questioned whether the House rank and file understood what it was doing.<sup>14</sup> The Court, however, did not rely on that ground.<sup>15</sup> Rather, it used this one egregious instance of cavalier congressional action to declare unconstitutional an entire range of statutory devices by which Congress has delegated broad powers to the executive branch and administrative agencies, while reserving for itself not merely power to oversee those laws' implementation but to block proposed action on a case-by-case basis. A strong dissent by Justice White lists 56 statutes containing such legislative vetoes<sup>16</sup> which, in effect, the majority has nullified. Of these, 15 are concerned with foreign affairs and national security. The Congressional Research Service estimates that, since

<sup>5</sup> *Chadha*, 462 U.S. at 923.

<sup>6</sup> 8 U.S.C. §§1252(b), 1254(a).

<sup>7</sup> *Id.* §1254(a)(1).

<sup>8</sup> *Id.*; see *Chadha*, 462 U.S. at 924. For a discussion of the reasons against deportation in Chadha's case, see *Chadha*, Transcript of Hearing of Deportation Proceedings held Jan. 11, 1974, Joint Appendix to the Briefs 12-15, 33-46 (available on LEXIS, Genfed Library, Briefs file).

<sup>9</sup> *Chadha*, 462 U.S. at 925-26; 8 U.S.C. §1254(c)(1).

<sup>10</sup> 8 U.S.C. §1254(c)(2).

<sup>11</sup> H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,247 (1975).

<sup>12</sup> *Chadha*, 462 U.S. at 926.

<sup>13</sup> *Id.* (quoting 121 CONG. REC. 40,800 (1975)).

<sup>14</sup> The Court cites a colloquy between Reps. Eilberg and Wylie, one year earlier, in which the former, in explaining the effect of a similar resolution, confirms the latter's stated understanding that, in preparing the resolution, "the gentleman has been working with the Attorney General's office" and is assured that it is not "in any way contrary to whatever action the Attorney General has taken." *Chadha*, 462 U.S. at 927 n.3.

<sup>15</sup> The courts are properly reluctant to supervise, and review compliance with, the procedures and rules by which the legislatures, as coequal branches, govern the conduct of their business. See *United States v. Ballin*, 144 U.S. 1 (1892), discussed *infra* note 205.

<sup>16</sup> *Chadha*, 462 U.S. at 1003-13.

1932, about 210 laws containing some 320 separate legislative vetoes have been enacted, of which more than 120 were in force in 1983, before the Court spoke.<sup>17</sup>

Whatever the exact number of statutory casualties, the decision is an event of seismological significance. In reaching it, the Court relied primarily on Article I, section 7, clause 2 of the Constitution, which states that a bill passed by both Houses of Congress<sup>18</sup> "shall, before it becomes a law, be presented to the President of the United States." The Constitution also provides that every bill or resolution, on presentation, may be signed into law by the President or, if disapproved by him, shall become law only on being "repassed by two thirds of the Senate and House of Representatives." (Article I, section 7, clause 3.) The one-House resolution used in *Chadha*'s case and, by virtue of the Court's sweeping language, perhaps all legislative vetoes were held not to accord with this immutable prescription.<sup>19</sup>

### *The Late Legislative Veto*

The term "legislative veto" is used to describe various devices that permit one or both Houses of Congress, or even a committee, to approve or disapprove an exercise of discretion by the executive branch acting under authority broadly delegated by Congress. Since such a vote does not occur in connection with legislation but, rather, in respect of a nonlegislative resolution, it provides the President no opportunity to veto the congressional action. Put more bluntly, the legislative veto represents a "deal" by which Congress gives the Executive a broad discretionary power—to stay *Chadha*'s deportation if the Attorney General believes certain guidelines applicable to his case, for example—in exchange for the power to rescind any particular instance of its use by a simple majority of one or both Houses, rather than by the two-thirds majority normally required to overrule the President. In holding this "deal" impermissible, the Court decided that the House resolution reversing the Attorney General and requiring *Chadha*'s deportation was "essentially legislative in purpose and effect."<sup>20</sup> Consequently, its object could only be accomplished in the manner prescribed by the Constitution, that is, by a law passed by both Houses and submitted to the President for his signature or veto.<sup>21</sup>

<sup>17</sup> Rosenberg, *Congressional Life after Chadha: Searching for an Institutional Response*, CONG. RESEARCH SERVICE REV., Fall 1983, at 5.

<sup>18</sup> The Court noted only four instances in which the Constitution allows either House of Congress to act unicamerally: the House alone is given the power to impeach, U.S. CONST. art. I, §2, cl. 5; the Senate alone is given the power to conduct trials following impeachment by the House, *id.*, art. I, §3, cl. 6; the Senate alone is given the power to approve or disapprove presidential appointments, *id.*, art. II, §2, cl. 2; and the Senate alone is given unreviewable power to ratify treaties, *id. Chadha*, 462 U.S. at 955.

<sup>19</sup> 462 U.S. at 957–58.

<sup>20</sup> *Id.* at 952.

<sup>21</sup> *Id.* at 957–58. This leaves open the bill of attainder issue, which such legislation would raise. See *id.* at 935 n.8; see generally *infra* note 247.

The Court conceded that the "deal" may often have been efficacious, but concluded that the fact that it was "efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."<sup>22</sup> Neither does frequency of usage imply precedential value. Rather, said the Court, "our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies."<sup>23</sup>

*Who Won? Who Lost?*

That the legislative veto represented a "deal" between the branches in which each yielded something of value to the other is, of course, not the prevalent view of the executive branch, which has maintained that it was a coerced, not a consensual, arrangement. Yet the history of the device does suggest, at least, a quasi-consensual origin. While there have been periods of intense controversy over the constitutionality of the veto, its roots lie in mutual accommodation. The *Chadha* litigation is an indication that this accommodation, which all along had been tenuous, broke down altogether in recent years. Neither branch truly benefits from this breakdown.

This is not apparent on the surface. The case arose in a manner that put plaintiff and defendant on the same side of the fence,<sup>24</sup> which led the court of appeals to ask both Houses of Congress to present briefs defending the constitutionality of the legislative veto.<sup>25</sup> Congress appears to have been the real loser; the President, the winner.

Yet this famous victory is not without potential costs to the Presidency. For example, the Court's conscious downgrading of arguments based on efficiency and frequency of usage<sup>26</sup> could be a serious threat to the President's powers to engage in undeclared wars or to enter into executive agreements, which, lacking basis in the text of the Constitution, are defended on the ground that practice perfects. The Court also seems to turn its back on another argument, used primarily by Presidents, that the Constitution must be interpreted flexibly to accommodate the need for decisive action in 20th-century circumstances. According to the majority opinion, "it is crystal clear from the records of the Convention, contemporaneous writings and debates,

<sup>22</sup> *Chadha*, 462 U.S. at 944.

<sup>23</sup> *Id.*

<sup>24</sup> The Attorney General heartily agreed with Mr. Chadha's argument that the role that the House of Representatives sought to play in determining the disposition of his case was either an unconstitutional encroachment by the legislature on executive (or, perhaps, judicial) functions, or an exercise of the legislative function in a manner not authorized by the Constitution. *Id.* at 939-40.

<sup>25</sup> *Id.* at 940.

<sup>26</sup> See, e.g., SENATE JUDICIARY COMM., CONGRESSIONAL OVERSIGHT OF EXECUTIVE AGREEMENTS, S. REP. NO. 1286, 93d Cong., 2d Sess. 8 (1974): "Improper executive action undertaken in the past cannot be employed as precedent for similarly improper actions today. . . . [To hold otherwise would be to concede] that Congress would bow supinely to the Executive, and permit immense changes in the Nation's constitutional structure without following the pattern dictated for such changes."



that the Framers ranked other values higher than efficiency."<sup>27</sup> This echoes Justice Brandeis's dissent in *Myers v. United States*<sup>28</sup> in 1926, but is not a view much in fashion during the past 50 years. Will the courts now reexamine the many constitutional accommodations made in the interest of an expeditious foreign policy?<sup>29</sup> The question would then arise: how much inefficiency in the conduct of foreign relations can the nation stand?

These problems may haunt the Presidency in the future. A more immediate problem is the disarray the *Chadha* decision has created in executive-congressional relations. While the legislative veto, or its arbitrary overuse by Congress, had become a thorn in the Executive's side,<sup>30</sup> it had also been a boon, recognized by Presidents since Herbert Hoover, in persuading Congress to delegate broad discretionary powers, instead of legislating narrowly detailed and inflexible rules. One authority already has tended to conclude that "*Chadha* represents . . . a transition to a . . . thoroughgoing repudiation of the constitutional upheaval that led to the approval, beginning in the mid-1930's, of the modern administrative state."<sup>31</sup> Is that a result desired by the executive branch? Even President Reagan, during the 1980 campaign, endorsed some uses of the legislative veto.<sup>32</sup> A perspicacious Chief Executive must feel less joy than ambiguity and a degree of apprehension at its passing.

### *Origins of the Legislative Veto*<sup>33</sup>

The dispute over the legislative veto began in 1920,<sup>34</sup> with President Wilson's spirited rejection of a seemingly innocuous appropriations bill<sup>35</sup> that, in effect, gave the Joint Committee on Printing power to regulate and authorize all government printing orders. In his veto message, Wilson said:

The Congress has the power and the right to grant or deny an appropriation, or to enact or refuse to enact a law; but once an appropriation

<sup>27</sup> *Chadha*, 462 U.S. at 958-59.

<sup>28</sup> 272 U.S. 52, 293 (1926).

<sup>29</sup> In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court stated that, in foreign affairs, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction which," because of the separation-of-powers requirement of the Constitution, "would not be admissible were domestic affairs alone involved." *Id.* at 320. Why "must" Congress's right to do this be recognized despite constitutional objections? Presumably because efficiency so requires.

<sup>30</sup> See, e.g., Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1002-29 (1975); see also *infra* notes 74-77 and accompanying text.

<sup>31</sup> Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. LEGIS. 1, 17 (1984).

<sup>32</sup> On Oct. 8, 1980, he expressed the view that "to better control the growth of federal regulations we should . . . grant both Congress and the president [sic] greater authority to veto regulations approved by executive agencies." 41 CONG. Q. WEEKLY REP. 1263-64 (June 25, 1983).

<sup>33</sup> The following history of the legislative veto is based on the discussion in Watson, *supra* note 30, at 1004-29.

<sup>34</sup> For an account of earlier attempts by Congress to exercise control over the Executive, see *id.* at 995-1003.

<sup>35</sup> H.R. 12,610, 66th Cong., 2d Sess. (1920).



is made or a law is passed, the appropriation should be administered or the law executed by the executive branch of the Government.<sup>36</sup>

The objectionable section was actually meant to increase executive discretion by replacing a provision of the previous year's appropriation that had required each government publication to secure prior legislative authorization.<sup>37</sup> Nevertheless, Wilson took his stand on constitutional principle rather than administrative convenience, and his veto was sustained in the House of Representatives after a heated debate.<sup>38</sup>

Congress succeeded in adopting its first legislative veto provision in the Legislative Appropriations Act for fiscal year 1933,<sup>39</sup> in response to President Hoover's request for broad "crisis" authority to effect "the most drastic economy" by radical "governmental reorganization."<sup>40</sup> Owing to "the practical difficulties of such reorganization," he asked for a free hand<sup>41</sup> but offered to let executive orders implementing the delegated authority "lie before the Congress for 60 days during sessions thereof before becoming effective, but becoming effective at the end of such period unless the Congress shall request suspension of the action."<sup>42</sup> In an earlier appeal for reorganization authority, Hoover had proposed that Congress authorize him to implement a reorganization scheme "upon approval of a joint committee of Congress."<sup>43</sup> What emerged was a "deal": the legislative veto. The Act permitted Hoover to reorganize the executive branch by executive order but gave Congress 60 days in which to stop the implementation of any order by a simple resolution of either House.<sup>44</sup> During consideration of the 1932 Act, some members challenged its constitutionality, not because of the legislative veto, but, rather, out of concern for the breadth of the delegation of legislative power to the President.<sup>45</sup> In debate, the defenders of the arrangement argued that the problem of overbreadth was cured by Congress's standby authority to veto each implementing order.<sup>46</sup>

The compromise, aside from its constitutional vulnerability, suffered from being both complex and based on an unfamiliar role for Congress. Indeed, there is some evidence that Hoover himself may not fully have understood the import of the deal he had cut<sup>47</sup> and that he erroneously believed Congress to have required each reorganization plan to be approved by a joint resolution.<sup>48</sup> Whatever his original attitude to the historic compromise that gave

<sup>36</sup> 59 CONG. REC. 7026 (1920).

<sup>37</sup> Act of Mar. 1, 1919, ch. 86, § 11, 40 Stat. 1213, 1270.

<sup>38</sup> 59 CONG. REC. 7067-72 (1920).

<sup>39</sup> Ch. 314, § 407, 47 Stat. 382, 414 (1932).

<sup>40</sup> 75 CONG. REC. 4109 (1932).

<sup>41</sup> *Id.*

<sup>41</sup> *Id.*

<sup>43</sup> H. HOOVER, PUB. PAPERS 432 (1929).

<sup>44</sup> Ch. 314, § 407, 47 Stat. 382, 414 (1932).

<sup>45</sup> 75 CONG. REC. 4716-21 (1932).

<sup>46</sup> *Id.* at 9262-55.

<sup>47</sup> His memoirs show that he thought he had offered Congress 60 days in which to repudiate a reorganization plan by joint resolution (a quite different device having the force of legislation and subject to presidential veto under the presentation clause): H. HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY, 1920-1933, at 283-84 (1952).

<sup>48</sup> *Id.*

birth to the legislative veto, within 1 year Hoover became deeply hostile, as Congress used its new power to disapprove each plan presented.<sup>49</sup> The next time Congress tried to use the device, Hoover vetoed it as unconstitutional.<sup>50</sup> His Attorney General, William D. Mitchell, wrote that the bill "attempts to entrust to members of the legislative branch, acting ex officio, executive functions in the execution of the law,"<sup>51</sup> and, even viewed as legislative function, the device was "equally obnoxious" because it would empower a joint committee "to legislate, and legislative power can not be delegated to it."<sup>52</sup> For good measure, he also wrote that the previous year's reorganization act "raises a grave question" of unconstitutionality.<sup>53</sup>

In the face of this strenuous opposition, the legislative veto provision was deleted not only from the deficiencies bill, but also from the next reorganization act,<sup>54</sup> and thereafter no such provisions were enacted until 1939.<sup>55</sup> A 1938 reorganization bill containing provision for a concurrent resolution veto died in committee after being characterized by President Roosevelt as no more than "an expression of congressional sentiment," which "cannot repeal Executive action taken in pursuance of a law."<sup>56</sup> Roosevelt promised, however, that if Congress were to pass and present to him a law ("joint resolution") disapproving a proposed reorganization order, he would, "in the overwhelming majority of cases, go along with carefully considered congressional action."<sup>57</sup>

Then, in 1939, without comment from Roosevelt, Congress passed a Reorganization Act<sup>58</sup> that authorized the President to submit plans to Congress, which could veto them within 60 days by concurrent resolution.<sup>59</sup> In the extensive debate on this bill, Congress seemed inclined to accept the view of the House Select Committee on Government Organization that the "failure of Congress to pass such a concurrent resolution is the contingency upon which the reorganizations take effect. Their taking effect is not because the President orders them. That the taking effect of action legislative in character may be made dependent upon conditions or contingencies is well recognized."<sup>60</sup> In support of this contentious proposition, the committee cited the Supreme Court's decision in *Currin v. Wallace*,<sup>61</sup> which upheld a statutory delegation of power to the Secretary of Agriculture permitting him to designate interstate markets for tobacco (at which product standards would be applied by federal inspectors), while making the exercise of that authority

<sup>49</sup> H.R. Res. 334, 72d Cong., 2d Sess., 76 CONG. REC. 2125-26 (1933).

<sup>50</sup> H.R. 13,975, 72d Cong., 2d Sess., *id.* at 2445-46.

<sup>51</sup> 37 Op. Att'y Gen. 56, 58 (1933).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 63-64.

<sup>54</sup> Treasury and Post Office Appropriation Act for fiscal year 1934, ch. 212, §407, 47 Stat. 1489, 1519, 76 CONG. REC. 3537-39 (1933). For a discussion of report and wait provisions, see *infra* notes 158-175 and accompanying text.

<sup>55</sup> See J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 207-08 (1964).

<sup>56</sup> 83 CONG. REC. 4487 (1938).

<sup>57</sup> *Id.*

<sup>58</sup> Reorganization Act of 1939, ch. 36, 53 Stat. 561.

<sup>59</sup> *Id.* §5, 53 Stat. at 562-63.

<sup>60</sup> H.R. REP. NO. 120, 76th Cong., 1st Sess. 6 (1939).

<sup>61</sup> 306 U.S. 1 (1939).

conditional upon ratification of the regulatory scheme by two-thirds of the growers in a referendum to be conducted market by market (a form of local option). "It seems difficult to believe," the House committee argued, "that the effectiveness of action legislative in character may be conditioned upon a vote of farmers but may not be conditioned on a vote of the two legislative bodies of the Congress."<sup>62</sup> Ever since, this has been the argument used to defend the veto device.

Once reintroduced, the veto proliferated during World War II, concomitant with the delegation of broad emergency powers to the executive branch. During those wartime years, over 30 laws were enacted with such provisions.<sup>63</sup> Roosevelt, concerned both to preserve his office's constitutional prerogatives and to get extraordinary powers from Congress, treated his dilemma pragmatically. In the case of the Lend-Lease Act of 1941,<sup>64</sup> which provided that its wide delegation could be repealed by a concurrent resolution,<sup>65</sup> he prepared a private memorandum asserting the unconstitutionality of the provision but filed it away discreetly and signed the bill. It was made public only posthumously.<sup>66</sup> On another occasion, the executive branch, through the General Counsel of the Office of Price Administration, actually defended a legislative veto provision as a contingent future condition in a delegation of discretionary authority that properly turned on "a finding of fact, an event, not an affirmative declaration of legislative policy."<sup>67</sup>

President Harry Truman even recommended inclusion of a legislative veto in the Reorganization Act of 1949.<sup>68</sup> A wary Senate committee, in reporting that bill, took the precaution of soliciting an opinion from the Attorney General.<sup>69</sup> A memorandum written by Tom Clark dismissed his predecessor Mitchell's statements as *obiter dicta* and "based on an unsound premise, namely, that the Congress in disapproving a reorganization plan is exercising a legislative function in a non-legislative manner." Congressional approval or disapproval by resolution not presented for presidential signature, Clark added, is neither legislation nor an improper legislative encroachment upon the Executive. Rather, it "is merely a case where the Executive and the Congress act in cooperation for the benefit of the entire Government and the Nation."<sup>70</sup>

<sup>62</sup> H.R. REP. NO. 120, *supra* note 60, at 6.

<sup>63</sup> See Watson, *supra* note 30, at 1089-90.

<sup>64</sup> Act of Mar. 11, 1941, ch. 11, 55 Stat. 31.

<sup>65</sup> *Id.* §3(c), 55 Stat. at 32.

<sup>66</sup> Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357 (1953).

<sup>67</sup> *Price-Control Bill: Hearings Before the House Comm. on Banking and Currency*, 77th Cong., 1st Sess. 983 (1941) (memorandum of David Ginsberg, General Counsel, Office of Price Administration).

<sup>68</sup> "The proper protection against the possibility of unwise reorganization," he wrote, "lies . . . in the authority of Congress to reject any such plan by simple majority vote of both Houses." H.R. REP. NO. 23, 81st Cong., 1st Sess. 3 (1949).

<sup>69</sup> S. REP. NO. 232, 81st Cong., 1st Sess. 18 (1949).

<sup>70</sup> *Id.* at 19, 20. The Attorney General's reply takes the form of a memorandum outlining the testimony he would give on the subject if requested, since the Attorney General, technically, is authorized by statute to render "opinions" only to the President and not to Congress.

With the legislative veto thus blessed by the Executive, its use became almost commonplace, and, for a time, the constitutional debate died away. In the three decades following World War II, approximately 40 statutes<sup>71</sup> containing veto provisions, including the antecedent of the immigration law considered in the *Chadha* decision,<sup>72</sup> were enacted without presidential complaint. Even the broad legislative veto provision in the Foreign Assistance Act of 1961—which effectively allows the repeal of any and all provisions of that very extensive law by concurrent resolution of both Houses—was signed by President Kennedy without comment.<sup>73</sup> It may be that their service in Congress predisposed Truman and Kennedy to see the advantages of the device and overlook its deficiencies. Such speculation, however, confronts the fact that the conflict resumed in 1973, when another ex-legislator, Richard Nixon, vetoed the War Powers Resolution<sup>74</sup> because “it denies the President his constitutional role in approving legislation.”<sup>75</sup> Congress overrode that objection,<sup>76</sup> but, thereafter, weakened Presidents have regularly protested the inclusion of the device in legislation and its use by assertive Congresses.<sup>77</sup>

## II. THE EFFECT OF *CHADHA* ON FOREIGN RELATIONS LAW

In a historical review, the legislative veto may be classified according to the various triggering mechanisms devised by Congress: the concurrent, one-House or committee resolutions or “come into agreement” requirements. A different classification is more helpful in analyzing the effect of the legislative veto’s demise.

Almost all of the devices by which Congress has delegated discretionary power, but sought to retain a degree of control over its implementation, can be grouped into four categories. The *first* allows Congress, by resolution, to disapprove a proposed executive initiative *before* it can go into effect. The *second* allows Congress similarly to terminate an executive action already begun under a grant of delegated power. The *third* requires the Executive to propose an initiative to Congress, which must approve it by resolution

<sup>71</sup> This total covers the period to 1974. Watson, *supra* note 30, at 1090–92.

<sup>72</sup> The veto provision of the Immigration and Nationality Act, 8 U.S.C. §1254(c)(2) (1982), first appeared in the Alien Registration Act, ch. 439, §20, 54 Stat. 670, 672 (1940).

<sup>73</sup> Pub. L. No. 87-195, §617, 75 Stat. 424, 444 (codified as amended in scattered sections of 7, 16, 22 and 42 U.S.C., 22 U.S.C. §2367 (1982)). See *infra* notes 87–88 and accompanying text.

<sup>74</sup> 50 U.S.C. §§1541–1548 (1982).

<sup>75</sup> R. NIXON, PUB. PAPERS 893 (1973). See also *infra* note 178 and accompanying text.

<sup>76</sup> The override is at 119 CONG. REC. 36,197–98 (1973) (Senate) and *id.* at 36,221–22 (House).

<sup>77</sup> See, e.g., President Ford’s veto of legislation allowing a one-House veto over pesticide regulations proposed by the Environmental Protection Agency. G. FORD, PUB. PAPERS 2144 (1976–77). In 1978, President Carter warned that he would be likely to veto new legislation containing legislative veto provisions and said that he would not consider himself legally bound by vetoes of arms sales, agency regulations or departmental spending proposals. N.Y. Times, June 22, 1978, at A1, col. 1. In one example of Carter’s policy, the Department of Education treated four regulations vetoed by Congress as “final and effective rules, effective immediately.” *Id.*, June 7, 1980, at 6, col. 6.

before it may be implemented. The *fourth* involves statutes that automatically terminate an executive action taken in accordance with a congressional delegation of authority on the occurrence of an event subsequent, but reserves to Congress the right to waive that termination by resolution. These four typologies will be discussed separately because the *Chadha* decision, while perhaps voiding them all, produces rather different consequences depending on the type of legislative veto at stake.

A single statute may contain several types of control mechanisms, while a few of the devices invented by Congress fall completely outside these four categories.<sup>78</sup> Nonetheless, the typology covers most situations and should facilitate evaluation of the post-*Chadha* situation.

### *Type I Devices*

Type I control mechanisms—the *Chadha* case involved one such—require the executive branch to inform Congress of a proposed action to implement a discretionary authority granted by legislation. Thereafter, for a specified period, implementation must wait until Congress has had an opportunity to consider it. During that period, the two Houses, or, in some instances, either House, may preclude the proposed initiative by passing a resolution of disapproval. Absent disapproval within the specified period, the Executive's initiative takes effect. Type I resolutions thus place on Congress the burden of blocking executive proposals. There are more than 20 such provisions in statutes bearing on foreign relations.<sup>79</sup>

<sup>78</sup> See *infra* notes 107–111 and accompanying text.

<sup>79</sup> Provisions in foreign affairs statutes that may be classified as Type I devices include: 10 U.S.C. §125(a) (1982) (one-House veto of transfer of functions, powers or duties within Defense Department); *id.* §2307(d) (1982) (one-House veto of certain advance payments to industries for production of defense equipment); *id.* §2382(b) (1982) (two-House veto of presidential regulations controlling defense contractor profits during war or national emergency); 19 U.S.C. §1303(e)(2) (1982) (one-House veto of Secretary of Treasury's determination to end countervailing duties on certain imports); 22 U.S.C. §2385a(b)(2) (1982) (one-House veto of regulations establishing unified personnel system for the Agency for International Development); *id.* §2429(b)(2)(A) (1982) (two-House veto of presidential decision to furnish aid to countries that deliver nuclear enrichment materials or technology to other countries that do not meet certain nuclear-safety standards); *id.* §2429a(a)(3)(A) (1982) (two-House veto of presidential decision to furnish aid to countries that deliver nuclear reprocessing equipment or materials to other countries); *id.* §2587(b) (1982) (one-House veto of transfer of activities or facilities of any agency to the U.S. Arms Control and Disarmament Agency); *id.* §2753(d)(2) (1982) (two-House veto of transfers of defense equipment to foreign countries or international organizations); *id.* §2776(b) (1982) (two-House veto of letters of offer to sell defense articles worth more than certain sums to foreign nations); *id.* §2776(c)(2) (1982) (two-House veto of export license for private sale of certain defense articles to foreign nations); *id.* §2796b(a) (1982) (two-House veto of certain leases or loans of defense equipment to foreign countries); 42 U.S.C. §2074(a) (1982) (two-House veto of Atomic Energy Commission (now Nuclear Regulatory Commission) proposal to give special nuclear material to any nation, group of nations or the International Atomic Energy Agency (IAEA)); *id.* §2157(b) (1982) (two-House veto of presidential decision to export certain nuclear material and facilities to countries in which IAEA safeguards are not imposed); *id.* §2158 (1982) (two-House veto of presidential decision to export nuclear materials or equipment to nations that have violated certain standards); *id.* §2160(f) (1982) (two-House veto of arrangement involving U.S. commitment to store foreign spent nuclear fuel in the United

Several Type I statutes place congressional controls on actions contemplated by a cabinet officer or an agency head. Most, however, focus on controlling presidential actions. While in most instances the proposed executive action must await the end of the congressional review period, a few Type I statutes permit the executive branch to proceed until its discretionary actions reach a designated quantitative threshold, at which point it must report to Congress and wait a specified time during which Congress may block further action by exercising its legislative veto. Thus, the Department of Defense Appropriation Authorization Act of 1974<sup>80</sup> gave the President unfettered discretion to implement industrial loans up to \$25 million for construction of defense equipment; above that amount, loans become subject to disapproval by concurrent resolution.<sup>81</sup>

Since the Supreme Court invalidated the Type I provision in *Chadha*, it is reasonable to assume that all Type I provisions are unconstitutional. This does not mean that the Type I device has no further utility for Congress in its effort to share in certain kinds of decision making. The Supreme Court specifically stated that it was not disallowing the requirement that the Executive delay action until its proposal has been before Congress for a specified period.<sup>82</sup> Congress may still use this waiting period to halt implementation, but it must now do so by ordinary legislation, subject to presidential veto. The statute establishing the waiting requirement may also provide procedures for expediting the consideration and passage of such legislation.<sup>83</sup>

### *Type II Devices*

Type II control mechanisms were intended to allow Congress, by a vote of disapproval, to terminate executive actions that were already being implemented.<sup>84</sup> For the most part, the statutes incorporating this device del-

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States); *id.* §8779(a) (1982) (one-House veto of Synthetic Fuels Corporation proposal to award financial assistance to up to two synthetic fuels projects in the Western Hemisphere outside the United States); 50 U.S.C. app. §1941g(b) (1982) (one-House veto of proposals for sale of Government-owned rubber-producing facilities); *id.* §468(a) (1982) (one-House veto of certain orders for production of defense equipment); *id.* §1917 (1982) (two-House veto of programs of Commodity Credit Corporation to increase food production in non-European countries); *id.* §2168(h)(3) (1982) (two-House veto of Cost Accounting Standards Board's regulations for defense contractors); *id.* §2092 (1982) (one-House veto of loans to industries for production of defense equipment). See also 42 U.S.C. §2153 (1982), cited in note 109 *infra*.

<sup>80</sup> Pub. L. No. 93-155, 87 Stat. 605 (codified in scattered sections of 10, 15, 22, 50 and 50 app. U.S.C.).

<sup>81</sup> 10 U.S.C. §2307(d) (1982) and 50 U.S.C. app. §468 (1982) contain identical provisions for advance payments and orders to industries for construction of defense equipment.

<sup>82</sup> The majority opinion states that "other means of control, such as . . . formal reporting requirements, lie well within Congress' constitutional power." *Chadha*, 462 U.S. at 955 n.19.

<sup>83</sup> See, e.g., 22 U.S.C. §2304 (1982); *id.* §2429a(3)(A) (1982); *id.* §2429(b)(2) (1982) (which include the expedited procedures in Pub. L. No. 94-329, §601, 90 Stat. 729, 765-66 (1976)).

<sup>84</sup> Examples of such provisions include 22 U.S.C.A. §1431 note (1979) (United States Information Agency's authority may be terminated by concurrent resolution); 22 U.S.C. §2151n(b) (1982) (Congress by concurrent resolution may end foreign assistance to countries that violate human rights); *id.* §2367 (1982) (Congress by concurrent resolution may end certain foreign

egated broad powers to the President, together with the right to implement specific exercises of that power, but reserved for Congress the right subsequently to terminate any action taken. A few Type II laws limit the period in which Congress may exercise this veto, but most do not. Some permit Congress not only to terminate a particular exercise of presidential discretion but virtually to repeal the entire statute granting the Executive contingent authority to act. The Defense Production Act of 1950,<sup>85</sup> for example, contains a provision allowing termination by concurrent resolution of any part or all of the Act.<sup>86</sup> The Foreign Assistance Act of 1961<sup>87</sup> provides that aid to a foreign state "under any provision of this chapter may . . . be terminated by concurrent resolution" of Congress.<sup>88</sup> However, so long as Congress does not act, the President is free to implement his delegated discretion.

All statutes of this second type also appear to fall squarely within the prohibitions established by the *Chadha* opinion. They, too, involve legislative action—the termination of an ongoing executive program or law—while avoiding the Constitution's presentation requirement. Type II statutes differ from those invalidated in *Chadha* only in the timing of the congressional exercise of the legislative veto, a difference without much constitutional significance.

There are practical differences, however. Type II provisions, unlike those categorized as Type I, do not occur in conjunction with lie-in-wait provisions. Thus, when they are struck down, there remains no such statutory residue. The President is free to act without having to report and wait. There is no procedurally determined occasion for Congress to address his initiative. When stripped of the congressional veto, Type II laws become virtually unlimited delegations, which raises two kinds of questions. First: would Congress have made such an outright statutory delegation to the Executive if it had known that its veto would be nullified? This goes, among other things, to the question of severability.<sup>89</sup> Second: is the delegation, stripped of the legislative veto, unconstitutionally overbroad?<sup>90</sup> These questions also arise in connection with Type I devices, but more starkly here, where nothing

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assistance programs); *id.* §2441 note (1982) (U.S. civilian personnel stationed in Sinai must be removed if Congress determines by concurrent resolution that their safety is jeopardized or that their role is unnecessary); 50 U.S.C. §1544(c) (1982) (Congress by concurrent resolution may terminate U.S. involvement in hostilities within 60–90-day period after President submits a report describing actions of armed forces); National Emergencies Act, *id.* §1622 (1982) (Congress by concurrent resolution may terminate national emergencies declared by the President); *id.* §1706(b) (1982) (Congress by concurrent resolution may terminate international emergency economic powers involving property owned by foreign countries or nationals); 50 U.S.C. app. §2166(b) (1982) (Congress may terminate any part or all of the Defense Production Act of 1950 by concurrent resolution).

<sup>85</sup> Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (codified as amended in scattered sections of 41 and 50 app. U.S.C.).

<sup>86</sup> 50 U.S.C. app. §2166(b) (1982).

<sup>87</sup> See *supra* note 73.

<sup>88</sup> 22 U.S.C. §2367 (1982).

<sup>89</sup> See *infra* notes 112–127 and accompanying text.

<sup>90</sup> See *infra* notes 128–141 and accompanying text.



remains of Congress's intended restraint on the Executive's discretion. Both issues are addressed below.

### *Type III Devices*

In a typical Type III provision, Congress purports to delegate discretion to the Executive but retains the final say over each instance in which it is exercised by requiring the Executive to secure prior approval from the legislature.<sup>91</sup> In effect, Congress delegates to the President only the power to "propose" while retaining for itself the power to "dispose." In a typical instance, the President is authorized to propose that the United States enter into binding agreements on nuclear fuel storage with foreign nations, but such agreements cannot be effected until after approval by both Houses.<sup>92</sup> As with the Type I model, the requirement to report a proposed course of action to Congress is an integral part of Type III provisions, although the latter usually set no time limit within which Congress must act. That, however, is the least of the differences between the two devices. The application of the *Chadha* reasoning to Type III devices has consequences quite different from those resulting from the voiding of Type I or Type II devices.

The Court's reasoning in the *Chadha* case appears to make Type III provisions unconstitutional by analogy, since they permit Congress to transform a mere presidential proposal into law by concurrent resolution without presentment. If so, it follows that, whether or not the unconstitutional Type III device is severable, the entire statute would fall into desuetude, since, without the concurrent resolution procedure, the statutory remnant would do no more than invite the Executive to propose draft legislation. On the other hand, if one examines substance rather than form, the unconstitutionality of these provisions is more apparent than real. While using the

<sup>91</sup> Type III provisions include the following: 12 U.S.C. §635e(b) (1982) (Export-Import Bank may lend over \$300 million to Soviet Union in a single loan only if the President proposes such a loan and Congress approves it by concurrent resolution); 19 U.S.C. §2435(c) (1982) (President may enter into certain bilateral commercial agreements with countries not previously allowed them if Congress approves by concurrent resolution); 22 U.S.C. §2293 note (1982) (no military assistance against Angola unless President determines that it is in the national security interest and submits a report to Congress and Congress approves by joint resolution); *id.* §3223(f) (1982) (President may not enter into binding agreements on nuclear fuel disposition and storage with foreign governments until both Houses approve); *id.* §3224a (1982) (Secretary of Energy may use no appropriated funds to repurchase, transport or store foreign spent nuclear fuel absent concurrent resolution or joint resolution of approval; alternatively, repurchase, transport or storage may be done if the President submits a plan detailing the use to which appropriated funds will be put and Congress does not reject the plan by concurrent resolution (a Type I provision)); Pub. L. No. 98-473, §8066, 98 Stat. 1837, 1936 (1984) (prohibition on aid to Nicaraguan contras absent presidential report on its necessity and congressional approval by joint resolution); Pub. L. No. 97-121, 95 Stat. 1647, 1651 (1981) (funds provided for Special Requirements Fund may not be obligated or expended without prior written approval of the Appropriations Committees of both Houses); *id.* §514, 95 Stat. at 1655 (no funds made available by the Act may be reprogrammed without prior written consent of Appropriations Committees of both Houses).

<sup>92</sup> 22 U.S.C. §3223(f) (1982).

judicially disapproved concurrent resolution, the Type III device is different from Types I and II, in that the role of Congress is to approve, rather than disapprove, a proposed executive action. As a practical matter, therefore, the failure of Congress to present such a Type III resolution for presidential signature deprives the President of nothing except the essentially meaningless opportunity to veto an initiative that he himself has proposed.<sup>93</sup>

The sweeping language of the Court in *Chadha*, however, may discourage such common-sense departures from the literal presentment requirement of the Constitution. Moreover, not all Type III devices are amenable to this analysis. Although, in typical Type III statutes, Congress is authorized to vote its approval of a proposal the President has initiated, some operate differently in practice by making Congress the arbiter of disputes between different parts of the administration, or between it and an independent agency.<sup>94</sup> The Trade Expansion Act of 1962,<sup>95</sup> for example, allows Congress, by concurrent resolution, to impose tariff restrictions recommended by the International Trade Commission (ITC) if the President, in exercise of statutory discretion, has rejected that recommendation. The law requires the President to alert Congress within 60 days if he fails to adopt the ITC's recommendation; by a procedure that evades presentment, Congress then has another 60 days to revive the ITC's rejected advice.<sup>96</sup> Another statute provides that if the Secretary of Defense and the President differ as to the application of a legislative standard for the export of arms to certain countries, Congress, by concurrent resolution, may overrule the President's decision and thus give effect to the Secretary's recommendation.<sup>97</sup> In these instances, the legislative control device, both on its face and in practice, probably violates the rule in the *Chadha* case, since the proposal Congress would be approving by concurrent resolution would not be the President's

<sup>93</sup> Dean F. Kirgis of the Washington and Lee University School of Law has observed as follows:

None of the purposes of the Presentment Clauses, as identified in *Chadha*, would be frustrated if the President initiates and Congress concurs. The purposes, according to *Chadha*, are to allow the Executive Branch to defend itself against the Congress; to guard against ill-considered measures adopted by Congress; and to assure that a national perspective is grafted on the legislative process.

Unpub. correspondence with author, Apr. 16, 1985.

<sup>94</sup> Such statutes include 19 U.S.C. §2253(c) (1982) (if International Trade Commission (ITC) recommends import relief and President does nothing or proposes something different, ITC proposal comes into effect if Congress votes concurrent disapproval of President's actions); 42 U.S.C. §2155(b) (1982) (if President wishes to issue a license for export of nuclear materials, but the Nuclear Regulatory Commission (NRC) disagrees with President's proposal, NRC view will prevail if Congress votes concurrent resolution disapproving export); 50 U.S.C. app. §2403-1(c) (1982) (if Secretary of Defense finds that export of certain defense goods to controlled countries would significantly increase the recipient country's military capability, but the President wants to go forward with the export, Secretary's decision will override if Congress votes concurrent disapproval resolution of the President's proposal).

<sup>95</sup> Pub. L. No. 87-794, 76 Stat. 872 (codified as amended in scattered sections of 19 and 26 U.S.C.).

<sup>96</sup> 19 U.S.C. §1981(a)(2) (1982).

<sup>97</sup> 50 U.S.C. app. §2403-1(c) (1982).

but one made by another agency or department of the Government and opposed by the President.

While it is true that the Type III device is not likely to be challenged as unconstitutional by the President in those instances where Congress merely uses it to implement an executive proposal, this does not ensure its survival. Private parties are already learning to use the *Chadha* case to advance their own interests by having statutes containing a concurrent resolution device, and the regulatory schemes established under them, declared unconstitutional even where no actual conflict of interest has arisen between the President and Congress.<sup>98</sup>

#### *Type IV Devices*

Statutes containing Type IV controls typically delegate contingent powers absolutely, subject to automatic repeal by an event subsequent. In some instances, that termination can be waived if Congress passes a concurrent resolution.<sup>99</sup> In some instances, automaticity takes the form of a statutory time limit on presidential action, which begins to run from the moment the President actually exercises his delegated authority. Thus, national emergency legislation<sup>100</sup> provides that presidential emergency powers terminate automatically after being in effect for 1 year. The War Powers Resolution contains a 60-90-day limit on presidential use of military forces in actual or anticipated combat situations.<sup>101</sup> In other cases, some event during the exercise of an authorized activity triggers its termination. Thus, an automatic cutoff in funding occurs by operation of law whenever a defense acquisition program incurs a 25 percent cost overrun.<sup>102</sup>

When such automatic termination occurs, its constitutionality is not impugnable by reference to the *Chadha* decision, which, on the contrary, confirms unequivocally that "durational limits on authorizations" are within

<sup>98</sup> See, e.g., *EEOC v. Allstate Ins. Co.*, 570 F.Supp. 1224, 1229 (S.D. Miss. 1983) (holding that fact that Congress never exercised a legislative veto cannot prevent finding that entire statute is unconstitutional under *Chadha*).

<sup>99</sup> Among Type IV provisions are: 10 U.S.C. § 139b(e)(3) (1982) (automatic cutoff in funding for major defense acquisition program experiencing significant cost overruns; may be waived by House and Senate Armed Services Committees); *id.* § 2382(c) (1982) (presidential regulations controlling defense contractor profits remain in force for 5 years unless extended by concurrent resolution before expiration date); 22 U.S.C. § 2304(c)(3) (1982) (automatic cutoff of security aid to a country for which Congress requests and the President fails to submit a report on human rights conditions); *id.* § 2314(g)(4)(B) (1982) (automatic cutoff of security aid where a country discriminates against U.S. citizens involved in defense functions in the country and the President fails to submit a report thereon; no explicit provision for restart of aid, but presumably joint resolution would suffice); *id.* § 2755(d)(2) (1982) (same provision as foregoing covering military equipment sales); War Powers Resolution, 50 U.S.C. § 1544(b) (1982) (President's powers to wage war under the statute terminate after 60 days absent congressional declaration of war, specific congressional authorization allowing use of armed forces, congressional extension of 60-day period or inability of Congress to meet as a result of attack upon the United States); *id.* § 1622(d) (1982) (national emergency terminates automatically after 1 year, unless extended by law).

<sup>100</sup> 50 U.S.C. § 1622(d) (1982).

<sup>101</sup> *Id.* § 1544(b).

<sup>102</sup> 10 U.S.C. § 139b(e)(3) (1982).

the power of Congress.<sup>103</sup> However, the *Chadha* rule may very well invalidate the second part of the Type IV device, by which Congress empowers itself to extend or reinstate, by concurrent resolution<sup>104</sup> or committee vote,<sup>105</sup> the lapsed executive discretion.<sup>106</sup> In such instances, the President will be the loser if *Chadha* applies. As its intended beneficiary, he is unlikely to be the one to complain that the provision is unconstitutional. Nevertheless, as with Type III devices, courts may feel compelled by a literal reading of *Chadha* to hold such provisions unconstitutional at the behest of an interested private party.

Several statutes do not fall neatly into any of the four foregoing categories. The Neutrality Act<sup>107</sup> authorizes Congress, by concurrent resolution, to declare that a state of war exists between foreign states, whereupon the President must issue a neutrality proclamation that triggers certain trade and navigational consequences.<sup>108</sup> This provision and others like it,<sup>109</sup> allowing Congress, *sua sponte*, to compel the President to take specified actions with far-reaching consequences, are probably unconstitutional, unless it is the Constitution, itself, from which Congress derives that authority.<sup>110</sup>

Finally, it should be noted that the unconstitutionality of the various categories of legislative veto appears not to have dampened altogether Congress's fondness for the device. Thus, a number of new instances of their deployment have occurred since the *Chadha* decision.<sup>111</sup>

<sup>103</sup> *Chadha*, 462 U.S. at 955 n.19.

<sup>104</sup> See, e.g., 10 U.S.C. §2382(c) (1982).

<sup>105</sup> See, e.g., *id.* §139b(e)(3).

<sup>106</sup> See *supra* note 99. In many such laws, the congressional waiver is not to be exercised by concurrent but by joint resolution, which satisfies the presentment provision of the Constitution.

<sup>107</sup> 22 U.S.C. §§441-457 (1982).

<sup>108</sup> E.g., American vessels may not carry passengers or goods to warring countries and certain materials may not be exported to those countries. *Id.* §§445-450.

<sup>109</sup> For a similar provision, see 33 U.S.C. §1602 (1982) (if Congress by concurrent resolution disapproves an amendment to the International Regulations for Preventing Collisions at Sea, 1972, the President must notify the Inter-Governmental Maritime Consultative Organization (now the International Maritime Organization) of an objection to the amendment by the United States). A different kind of provision not included in the four prototypical categories allows Congress to waive legislative lie-in-wait provisions: 10 U.S.C. §2676(d) (1982) provides that military purchases of real property may be made 21 days after congressional committees are alerted or, before then, if committees vote approval; *id.* §§2803-2807, 2854 (1982) (same provision covering military purchase of real property); 42 U.S.C. §2153 (1982) provides that the President must submit cooperation agreements on nuclear materials to foreign affairs committees of the two Houses for 30-day period, which committees may waive.

<sup>110</sup> A declaration of neutrality by Congress may be analogous to a declaration of war. Professor Louis Henkin takes no position on the proposition that a congressional declaration of war is not subject to presidential veto but cites views expressed on both sides and notes that the issue is hypothetical since "all declarations of war were made in response to Presidential request." L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 33 n.5 (1972).

<sup>111</sup> Since the *Chadha* decision, Congress has added several legislative—actually, committee—veto provisions to laws. These require prior consent of the House and Senate Appropriations Committees for reprogramming of funds and for specified expenditures. So long as everyone agrees to play by these rules, they may survive indefinitely. See, e.g., Department of Transportation and Related Agencies Appropriations Act, 1983, Pub. L. No. 98-78, tits. I, III, 97 Stat. 453, 462, 473; Supplemental Appropriations Act, 1983, Pub. L. No. 98-63, chs. IV, VI, VII, 97

## III. SEVERABILITY

The effect of *Chadha* on existing legislation and patterns of executive-congressional cooperation and power sharing cannot be determined solely in terms of the constitutionality of the four basic types of legislative vetoes. An additional factor in measuring the decision's effect is the severability of those veto provisions which are unconstitutional. If a particular legislative veto is severable, what remains is usually a very broad delegation of authority by Congress to the Executive, which may pose further constitutional and practical problems (see below). If it is not severable, the law crumbles like Ozymandias's statue and the Executive may be excluded from conducting important aspects of the nation's business until Congress builds something new.

Although Congress has never exercised a legislative veto in a foreign relations matter, it has come close on two occasions.<sup>112</sup> Important subjects such as the war power, national emergencies, foreign assistance, arms exports and foreign trade include such devices as an integral part of their statutory scheme. Are these statutes now invalid? If they are, Congress must decide whether to write an entirely new statutory basis for executive conduct of the affected aspect of the nation's foreign relations, or let the President's authority lapse. If, on the contrary, the legislative vetoes are severable, Congress must decide whether to devise new checks on what might otherwise be an unlimited delegation of authority, or whether to repeal that delegation.

In most instances, the invalid provision will probably be severable. In *Chadha*, the Supreme Court reaffirmed a test it had developed in earlier cases, which asks whether "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not."<sup>113</sup> Yet it did not content itself with engaging in what it referred to as this "elusive inquiry"<sup>114</sup> into statutory history. The Court was able to reply on the face of the statute, which "itself has provided the answer"<sup>115</sup> in the form of a standard severability clause. Additionally, the Court made a presumption in favor of severability if, after pruning away an unconstitutional provision, the statute nevertheless can be read as "fully operative

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Stat. 301, 312, 319, 328; National Aeronautics and Space Administration Authorization Act, 1984, Pub. L. No. 98-52, §§103, 110, 97 Stat. 281, 283-84, 285; Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1984, Pub. L. No. 98-45, tits. II, III, IV, 97 Stat. 219, 228, 229, 236, 239.

<sup>112</sup> The House passed resolutions of disapproval to stop the sale of nuclear materials to India in 1980 and, in 1981, to prevent the sale of AWACS and F-15 enhancements to Saudi Arabia. The Senate, in both instances, failed to join in the concurrent resolution procedure, and the transfers were thus effected by the President. See Collier, *Legislative-Executive Balance in Foreign Policy without the Legislative Veto*, CONG. RESEARCH SERVICE REV., Fall 1983, at 9.

<sup>113</sup> *Chadha*, 462 U.S. at 931-32 (citing *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)).

<sup>114</sup> *Chadha*, 462 U.S. at 932. The Court's analysis of legislative history indicated that Congress wanted to maintain some control over cancellations of delegation procedures. *Id.* at 933-34.

<sup>115</sup> *Id.* at 932. The Court treats this as presumptive. But see *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd*, 103 S.Ct. 3556, *reh'g denied*, 104 S.Ct. 40 (1983) (describing the question of where the presumption lies as "mostly irrelevant").

as a law."<sup>116</sup> Such a contextual presumption can only be rebutted by legislative history unambiguously demonstrating that Congress would have wanted the entire act to lapse if the legislative veto were voided.<sup>117</sup> No such intent was discerned by the Supreme Court in the legislative history of the statute implicated in the *Chadha* case.

Overall, the Court in *Chadha* appeared to express a strong preference for continuing the validity of existing laws. In several recent opinions, however, district courts have invalidated whole statutes by finding legislative veto provisions nonseverable. In *EEOC v. Allstate Insurance Co.*,<sup>118</sup> a district court examined the legislative history of a Type I, one-House veto in the Reorganization Act of 1977, which contained no severability clause. This absence, the court thought, "suggests . . . inseverability."<sup>119</sup> Moreover, although the Act could have operated without the invalid provision, the court found that the legislative history clearly demonstrated interdependence between the grant by Congress of discretionary powers to the President and its retention of a legislative veto over the exercise of that discretion.<sup>120</sup> Accordingly, the unconstitutionality of the device was found to have invalidated the whole Act.<sup>121</sup>

Other district courts that have examined the legislative history of the Reorganization Act since *Chadha* have reached the opposite conclusion.<sup>122</sup> Nonetheless, *Allstate* demonstrates that, in at least some cases, entire statutes may be invalidated as a result of the *Chadha* opinion.<sup>123</sup> On the whole, however, this is likely to be the result only in exceptional cases,<sup>124</sup> especially

<sup>116</sup> *Chadha*, 462 U.S. at 934 (quoting *Champlin*, 286 U.S. at 234).

<sup>117</sup> *Chadha*, 462 U.S. at 934. The Court did not specify the exact amount of statutory language stricken by this analysis. Presumably, however, only the smallest possible portion of the statute will be severed. See AM. JUR. 2D *Administrative Law* §§33-34.

<sup>118</sup> 570 F.Supp. 1224 (S.D. Miss. 1983), *appeal dismissed for lack of juris.*, 104 S.Ct. 3499 (1984).

<sup>119</sup> 570 F.Supp. at 1230 n.18 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-13 (1936)). However, there remains uncertainty as to the implication of the absence of a severability clause. In *Consumer Energy*, 673 F.2d at 440-45, the court severed a legislative veto provision in the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301-3432, 42 U.S.C. §7255 (1982), despite the absence of a severability clause. Citing *United States v. Jackson*, 390 U.S. 570, 585 n.27, the *Consumer Energy* court specifically stated that the absence of a severability clause does not raise a presumption of nonseverability. 673 F.2d at 442; see also *EEOC v. City of Memphis*, 33 F.E.P. Cases 1089 (W.D. Tenn. 1984).

<sup>120</sup> *Allstate*, 570 F.Supp. at 1232. The court stated:

[C]ertainly it would not be suggested that the intent of Congress was to allow the one-House veto provision to be severed giving the President free reign [*sic*] to propose and enact whatever reorganization he desired within the framework of the delegation of power contained in the other sections of the Act.

<sup>121</sup> *Id.* at 1232. See also *EEOC v. Martin Indus.*, 581 F.Supp. 1029 (N.D. Ala.), *appeal dismissed*, 105 S.Ct. 63 (1984); *EEOC v. Westinghouse Elec. Corp.*, 33 F.E.P. Cases 1232 (W.D. Pa. 1984).

<sup>122</sup> See, e.g., *EEOC v. Peat, Marwick, Mitchell & Co.*, 589 F.Supp. 534 (E.D. Mo. 1984); *Muller Optical Co. v. EEOC*, 574 F.Supp. 946 (W.D. Tenn. 1983), *aff'd*, 743 F.2d 380 (6th Cir. 1984).

<sup>123</sup> *Allstate* is notable also because the court decided the merits of the case even though the veto in question was never exercised. 570 F.Supp. at 1229.

<sup>124</sup> For a somewhat analogous situation, see the clear statement doctrine, discussed *infra* note 137 and accompanying text.

even judges. The Supreme Court has held that where "the words [of a statute] are ambiguous, the judiciary may properly use the legislative history to reach a conclusion."<sup>146</sup> Such manufactured legislative history occasionally can be a useful way to send a signal of intent to the President in a situation where Congress is not so sure of itself as to want to cast its wishes in statutory concrete.

### *Sense of Congress Resolutions*

The same may be said of a "sense of Congress" resolution. It, too, is a nonbinding device to enable the legislative branch to communicate its collective thinking on a particular subject. An example is Congress's expressed opposition to the Reagan administration's policy regarding the mining of Nicaraguan harbors.<sup>147</sup> Such a resolution cannot stop lawful executive activity, but it can be a source of embarrassment to the President,<sup>148</sup> exposing his lack of congressional support and warning of future congressional legislative retribution if the policy is not reconsidered. A sense of Congress resolution is also a highly visible way to galvanize the public. Presidents are likely to treat it almost as seriously as a draft bill.<sup>149</sup> Indeed, they may give it even more attention, because the sense of Congress resolution, not being legislation, cannot be vetoed.

All this combines to make the device a source of significant potential congressional leverage, useful in compelling negotiations with the Executive, particularly in sudden crises with sufficiently high visibility to attract the attention of the congressional rank and file. Moreover, the *Chadha* decision, in effect, could be interpreted as having converted the numerous legislative veto provisions into nonbinding sense of Congress resolutions. From a presidential perspective, that has one significant advantage. If the Executive decides to accede to a request (as in the case of the Nicaraguan harbor mining), it is possible to do so as a matter of grace and favor, without appearing to acknowledge the authority of Congress.

## VI. STATUTORY ALTERNATIVES

### *Joint Resolutions and Riders*

If Congress does not wish to depend on presidential grace and favor, it may, of course, legislate on such foreign relations matters as are within its constitutional competence. While they may merely restate what is obvious, some statutes that grant the President broad discretionary powers have also included provisions for overruling an exercise of that discretion by joint resolution, a legislative device which satisfies the *Chadha* requirements of

<sup>146</sup> *United States v. Public Utils. Comm'n of Cal.*, 345 U.S. 295, 315 (1953).

<sup>147</sup> *N.Y. Times*, Apr. 13, 1984, at A4, col. 3 (House); *id.*, Apr. 11, 1984, at A1, col. 6 (Senate).

<sup>148</sup> *Id.*, Apr. 13, 1984, at A24, col. 3; *id.*, Apr. 12, 1984, at A12, col. 4.

<sup>149</sup> *See id.*, Apr. 13, 1984, at A4, col. 3 (stating that Congress's passage of nonbinding resolutions opposing use of U.S. funds to mine Nicaraguan harbors would put an end to the mining).

bicamerality and presentment.<sup>150</sup> Section 502B of the Foreign Assistance Act of 1961 as amended,<sup>151</sup> for example, provides for blocking by joint resolution any military assistance program directed to a country engaging in a pattern of gross violations of human rights.<sup>152</sup> Since such resolutions are subject to presidential veto, in practice they can only be passed by bicameral two-thirds majorities.

To shorten those odds, Congress sometimes employs a "rider," which is a substantive provision added to an appropriations bill to control how funds may—or may not—be spent.<sup>153</sup> Congress has used riders to terminate funding for designated covert operations.<sup>154</sup> The tactical advantage of a rider is that, if it is part of a spending package, the President will be faced with a difficult choice between accepting it and vetoing the whole. A subsidiary effect of *Chadha*, therefore, may be to strengthen the legislators' resolve not to help the President acquire a "line item" veto power.<sup>155</sup>

In reaction to *Chadha*, Congress has already opted, in at least one instance,<sup>156</sup> to substitute a joint resolution procedure for an unconstitutional concurrent resolution. But this is mostly face-saving. As Justice White has pointed out, it is extraordinarily difficult, in practice, for Congress to enact

<sup>150</sup> *Chadha*, 462 U.S. at 935 n.8, 955; but see *Hearings*, *supra* note 144, at 33, 43 (exchange between Stanley M. Brand, Gen. Counsel to the Clerk, House of Reps. and Rep. Dante B. Fascell) (questioning whether any subsequent limitation on already delegated authority—including a joint resolution—remains constitutional after *Chadha*).

<sup>151</sup> 22 U.S.C. §2304 (1982).

<sup>152</sup> *Id.* §2304(c)(4)(A).

<sup>153</sup> The constitutionality, albeit not necessarily the wisdom, of legislating in money bills has frequently been upheld. *United States v. Dickerson*, 310 U.S. 554, 555–56 (1940); *Roe v. Casey*, 623 F.2d 829, 836 (2d Cir. 1980). But cf. Rule XVI of the Standing Rules of the United States Senate, 98th Cong., reprinted in F. CUMMINGS, *CAPITOL HILL MANUAL* 149 (2d ed. 1984), which allows a point of order to lie against "general legislation" or a "not germane" provision offered as an amendment to an appropriations bill. This rule, however, has reduced but not abolished the practice in the absence of a comparable rule for the House of Representatives.

<sup>154</sup> For fiscal 1983, Congress forbade the use of defense funds to finance forces "for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras." Pub. L. No. 97-377, §793, 96 Stat. 1830, 1865 (1982). For 1984, the law limited to \$24 million the funds available for "supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual." Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, §775, 97 Stat. 1421, 1452. Next, the Continuing Appropriations Act, 1985, included a provision prohibiting funding to the Nicaraguan contras during fiscal year 1985 unless, after Feb. 28, 1985, the President submits a report stating that a resumption of assistance is necessary and Congress approves such assistance by joint resolution (i.e., legislation). Pub. L. No. 98-473, §8066, 98 Stat. 1837, 1935–36. In 1976, Congress prohibited the use of any funds in the Defense Department Appropriation Act "for any activities involving Angola other than intelligence gathering." Pub. L. No. 94-212, tit. IV, 90 Stat. 153, 166.

<sup>155</sup> *N.Y. Times*, May 4, 1984, at A19, col. 1; *id.*, Jan. 4, 1984, at A16, col. 3.

<sup>156</sup> S. 1858, 98th Cong., 1st Sess. (1983) and H.R. 3932, 98th Cong., 2d Sess. (1983) (bills to amend the District of Columbia Self-Government and Governmental Reorganization Act) (passed House Oct. 4, 1983). See generally 129 CONG. REC. S12,545–46 (daily ed. Sept. 20, 1983); *id.* at S12,526–27.



a law terminating an executive initiative in foreign relations once it is under way.<sup>157</sup>

### *Report and Wait Statutes*

If Congress wishes to have an impact on a presidential policy by legislating, or threatening to legislate, *before* a policy is initiated, it can create that opportunity by enacting "report and wait" requirements in either negative or affirmative terms.<sup>158</sup> The former requires each executive initiative taken pursuant to a delegation of authority to lie before Congress for a designated time, after which it becomes law unless Congress has acted.<sup>159</sup> The latter requires Congress to legislate approval during the waiting period before the proposed initiative can be taken.

*Negative Report and Wait Provisions.* In dicta in *Sibbach v. Wilson & Co.*,<sup>160</sup> the Supreme Court approved a negative report and wait provision used in connection with promulgating the Federal Rules of Civil Procedure,<sup>161</sup> a view confirmed by both the majority<sup>162</sup> and the dissent in *Chadha*.<sup>163</sup> Although the device was already in use before *Chadha*,<sup>164</sup> it has now become the subject of far more interest, having already been put forward, for example, as an amendment to Consumer Product Safety Commission (CPSC) legislation that would have required the CPSC to lay each proposed safety rule before Congress for 90 days, during which time it could be barred by joint resolution.<sup>165</sup> However, neither this nor other similar initiatives were

<sup>157</sup>

[T]he passage of corrective legislation after . . . Executive Branch officials have acted entails the drawbacks endemic to a retroactive response. "Post hoc substantive revision of legislation . . . could have serious prejudicial consequences; . . . if Congress rescinded the sale of arms to a foreign country, our relations with that country would be severely strained. . . ."

*Chadha*, 462 U.S. at 973 n.10 (White, J., dissenting) (quoting Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 464 (1977)).

<sup>158</sup> See Schwartz, *Legislative Control of Administrative Rules and Regulations* (pt. I), 30 N.Y.U. L. REV. 1031, 1032-33 (1955).

<sup>159</sup> *Id.*; see also W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 116 (1979).

<sup>160</sup> 312 U.S. 1 (1941).

<sup>161</sup> The *Sibbach* provision stated that the Federal Rules of Civil Procedure "shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." Act of June 19, 1934, 48 Stat. 1064, quoted in *Sibbach*, 312 U.S. at 8. During the session, Congress could amend or reject the Rules by passing appropriate legislation. See *Chadha*, 462 U.S. at 935 n.9.

<sup>162</sup> *Chadha*, 462 U.S. at 935 n.9 (citing *Sibbach*).

<sup>163</sup> *Id.* at 973 n.10.

<sup>164</sup> See, e.g., Atomic Energy Act of 1954, §123, 42 U.S.C. §§2011-2282, §2153(d) (1982) (providing that bilateral agreements on nuclear power with other nations shall not go into effect for 60 days after the President has submitted the proposal to Congress). For a compilation of report and wait procedures in U.S. statutes, see Comment, *Legislative Control over Administrative Action: The Laying System*, 10 J. MAR. J. PRAC. & PROC. 515 (1977).

<sup>165</sup> See H.R. 2668, 98th Cong., 1st Sess., 129 CONG. REC. H4771-81 (daily ed. June 29, 1983) (amendment of Rep. Waxman) (passed by House); see also *infra* note 175 for an affirmative report and wait provision in the same bill and *infra* note 209 for a point of order procedure in the Senate version of the bill.

adopted in 1984.<sup>166</sup> Nor is it a panacea. While the negative report and wait requirement has the undoubted advantage of promoting negotiations between Congress and the President before a policy is implemented, and of facilitating congressional action before implementation has begun, it still requires Congress to muster a two-thirds majority to overcome a presidential veto if negotiations fail to effect a compromise.<sup>167</sup> Knowing this, Presidents are less likely to be accommodating than they were before *Chadha*, when their initiatives could be blocked by simple majority votes of Congress. The device has the further disadvantage of imposing on Congress a duty to keep an eye on everything that is reported and to act within the allotted waiting period. Used widely, this could easily overwhelm the legislators.

In Great Britain, where report and wait provisions are often attached to laws delegating discretionary powers to ministers or the Crown, Parliament has created a Select Committee on Statutory Instruments, more commonly referred to as the "Scrutiny Committee."<sup>168</sup> It examines ministerial proposals, alerts the Commons to those which may be controversial<sup>169</sup> and appears to be a modest success.<sup>170</sup> However, it is unlikely that the idea is exportable because the territorially jealous substantive committees of Congress would be very unlikely to yield so important a part of their responsibility.

*Affirmative Report and Wait Provisions.* The affirmative report and wait provision differs from the negative version in that the reported proposal cannot take effect unless it is specifically approved by subsequent joint resolution of Congress. A statute that delegates discretionary authority to the President subject to such a requirement delegates nothing except the power—already inherent in the Presidency—to propose legislation.<sup>171</sup> This is an equivalent substitute for the Type III concurrent resolution, if that

<sup>166</sup> For other examples of negative report and wait provisions proposed, but not enacted, since *Chadha*, see S. 1650, 98th Cong., 1st Sess., 129 CONG. REC. S10,473-77 (daily ed. July 20, 1983) (providing for a joint resolution of disapproval over all rules under the Administrative Procedure Act that are subject to public notice and comment); H.R. 3754, 98th Cong., 1st Sess., 129 CONG. REC. H6473 (daily ed. Aug. 3, 1983) (amending the Impoundment Control Act of 1974 by providing for disapproval of presidential spending deferrals—i.e., spending at a rate slower than that required by statute—by bill or joint resolution) (replaces one-House veto resolution).

<sup>167</sup> See Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 AD. L. REV. 667, 669-73 (1980) (stating that passage of a joint resolution overturning federal agency rules "presents difficulties" and citing only six examples between 1973 and 1978 in which Congress passed such legislation).

<sup>168</sup> Schwartz, *supra* note 158, at 1033; Comment, *supra* note 164, at 523.

<sup>169</sup> Schwartz, *supra* note 158, at 1033; Comment, *supra* note 164, at 523. In scrutinizing agency proposals, the committee's main concern is whether the agency has met the general aims of the parliamentary delegation. To facilitate the committee's inquiry, Parliament has established eight specific guidelines. If an agency proposal falls afoul of any of these guidelines, the committee may investigate the proposal and alert Parliament. In its investigation, the committee may require written or oral testimony from agency officials. See Schwartz, *supra*, at 1050-51; Comment, *supra*, at 523.

<sup>170</sup> Schwartz, *supra* note 158, at 1033; Comment, *supra* note 164, at 523.

<sup>171</sup> See generally *Hearings*, *supra* note 144, at 141-42 (statement of Prof. David A. Martin, Univ. of Va. School of Law) (discussing a proposed amendment to the Arms Export Control Act designed to offset *Chadha*).

device is unconstitutional under *Chadha*, although it should be noted that Type III concurrent resolution provisions cannot be transformed into joint resolution provisions by the expedient of having the President sign the resolution. It is not presentable for his assent. The statutory provision would have to be amended to spell out the change from "concurrent" to "joint." Widely used, however, the affirmative joint resolution requirement would make the conduct of foreign relations impossible, since all executive proposals opposed by either the House or the Senate would die automatically.<sup>172</sup> This is the functional equivalent of a one-House veto, except that it would be constitutional. Still, despite its impracticality, the device was used in 1984 to cut off funding to contra forces in Nicaragua,<sup>173</sup> echoing a 1980 use of the same device to stop covert operations in Angola.<sup>174</sup> Understandably, after *Chadha*, Congress has been invited to adopt such affirmative report and wait requirements for a broad range of subjects, from nuclear cooperation agreements to the sale of Conrail. By the end of 1984, however, only one of these had been enacted.<sup>175</sup>

While it would very significantly augment congressional power, an affirmative report and wait provision—even more than the negative provision—would also increase congressional responsibilities. Scrutiny of large numbers of presidential proposals and their adoption into law would impose a heavy burden on members and staff. The executive branch, moreover, could quickly come to dominate the legislative agenda with a profusion of relatively minor items. Used very selectively, on the other hand, it might prove an effective option for real power sharing. Its use is most clearly indicated in barring executive discretion in connection with a predictable, specific, but infrequently arising circumstance that is unlikely to occur in the context of

<sup>172</sup> Affirmative report and wait provisions have been used by Congress only on rare occasion. See *supra* note 91.

<sup>173</sup> Pub. L. No. 98-473, *supra* note 91; see also *supra* note 154.

<sup>174</sup> International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, §404, 90 Stat. 729, 757 (codified as amended in scattered sections of 22 U.S.C., 22 U.S.C. §2293 note (1982)).

<sup>175</sup> In the wake of *Chadha*, the Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192, which include an affirmative report and wait provision, became law. The amendments allow reorganization of federal agencies only after the President has transmitted a plan to Congress, Congress has approved the plan by joint resolution within 90 days of transmittal and the President has signed the resolution. For the proposed amendment to apply the affirmative report and wait device to nuclear cooperation agreements, see S. 979, 98th Cong., 2d Sess. (1984) (passed Senate Mar. 1, 1984; passed House Mar. 8, 1984), 130 CONG. REC. S1929 (daily ed. Feb. 29, 1984) (amendment of Sen. Proxmire). A proposed amendment to the Administrative Procedure Act subjects major agency rules to a joint resolution of approval mechanism, while subjecting less important rules to joint resolution of disapproval procedures. H.R. 3939, 98th Cong., 1st Sess., 129 CONG. REC. H7166-69 (daily ed. Sept. 20, 1983). Two other examples of proposed affirmative report and wait provisions are H.R. 3648, 98th Cong., 1st Sess., 129 CONG. REC. H8122-23, H8169 (daily ed. Oct. 6, 1983) (passed by House Mar. 6, 1984) (proposing that congressional approval by joint resolution be required before the Government may sell the Conrail system), and H.R. 2668, 98th Cong., 1st Sess., 129 CONG. REC. H4773-81 (daily ed. June 29, 1983) (amendment of Rep. Levitas) (passed by House); see also *supra* note 165 for a negative report and wait provision in the same bill and *infra* note 209 for a point of order procedure in the Senate version of the bill.

an emergency. Arms sales may qualify, as also nuclear exports and certain tariff waivers, but there is no plethora of such targets of opportunity.

### *Consultation Requirements*

Congress, by legislation, can mandate consultation with all, or designated, members of Congress before the President implements a new policy or takes a designated action. Such a requirement can give Congress a role, although not necessarily a controlling one. Members would at least be able to inform the Executive of their views and, by gaining information early, could move preemptively to block a proposed action by law before it is implemented. For that very reason, however, consultation requirements invite narrow construction by an Executive fearing the consequences of premature disclosure to Congress.

Statutory consultation requirements already exist in various guises. The War Powers Resolution<sup>176</sup> requires the President to consult with Congress "in every possible instance" before introducing U.S. troops into situations of actual or imminent hostilities.<sup>177</sup> Perhaps in part because it is so vague a requirement, this was one of the resolution's least controversial aspects. In vetoing it, President Nixon even cited the consulting requirement as "a constructive [measure] which would foster . . . the flow of information from the executive branch to the Congress,"<sup>178</sup> although that may not have been quite the direction of flow Congress had in mind. Whether the requirement's vagueness is exploited, in any particular instance, to facilitate evasion depends largely on the climate existing at the time between Congress and the executive branch. Prior to 1980, a comparable requirement that the Central Intelligence Agency keep the Senate Intelligence Committee "fully and currently informed with respect to intelligence activities, including any significant anticipated activities,"<sup>179</sup> appeared to work well,<sup>180</sup> providing the committee with adequate opportunity to affect proposed activities before they were commenced.<sup>181</sup> Recently, however, the process has shown some signs of unraveling. The Chairman of the Senate Intelligence Committee has complained publicly that he was able to learn of the CIA-sponsored mining of Nicaraguan harbors only through the press,<sup>182</sup> a complaint the CIA Director angrily denied.<sup>183</sup> Describing the quality of consultation between the Director and the House Intelligence Committee prevailing in 1984, Congressman Norman Y. Mineta stated, "We've dug, probed, cajoled, kicked and harassed to get facts from the CIA, but [CIA Director William] Casey wouldn't tell

<sup>176</sup> 50 U.S.C. §§1541-1548 (1982).

<sup>177</sup> *Id.* §1542.

<sup>178</sup> *Veto of the War Powers Resolution*, Oct. 24, 1973, in R. NIXON, PUB. PAPERS 893, 895 (1973). See also *supra* note 75 and accompanying text.

<sup>179</sup> S. Res. 400, 94th Cong., 2d Sess. §10(a) (1976).

<sup>180</sup> N.Y. Times, May 14, 1984, at A12, col. 3.

<sup>181</sup> *Oversight of U.S. Government Intelligence Function: Hearings Before the Senate Comm. on Governmental Operations*, 94th Cong., 2d Sess. 33 (1976).

<sup>182</sup> N.Y. Times, Apr. 11, 1984, at A1, col. 6. The Chairman was supported in this assertion by his Democratic counterpart. See Moynihan's *Farewell*, *id.*, Oct. 15, 1984, at A14, col. 4.

<sup>183</sup> *Id.*, Apr. 11, 1984, at A1, col. 6.

you that your coat was on fire unless you asked him."<sup>184</sup> The breakdown of the process, in that instance, was sealed when Congress passed its concurrent resolution condemning the mining.<sup>185</sup>

Moreover, while intelligence consultation works some of the time, the parallel provisions in the War Powers Resolution do so less frequently. In every military involvement since its adoption, the President either has not consulted with Congress or has done so in a perfunctory manner. In rescuing Americans from Southeast Asia at the close of the Vietnam War, President Ford argued that those missions did not indicate imminent involvement in hostilities.<sup>186</sup> In the *Mayaguez* incident, where no such argument could be made, consultation did not occur until 12 hours after the first shots were fired.<sup>187</sup> Even then, it consisted of no more than notifying members of the ongoing operation.<sup>188</sup> The Senate's majority leader at the time, Mike Mansfield, stated, "I was notified after the fact about what the Administration had already decided to do."<sup>189</sup> The Iran rescue mission was undertaken by the President without consulting any member of Congress, despite its military magnitude, as were military missions to El Salvador in 1981, Beirut in 1982 and Chad in 1983.<sup>190</sup> More recently, President Reagan informed Congress a mere 3 hours before the Grenada invasion began, after the troops were already beyond recall.<sup>191</sup> In most instances, to be sure, it could be—and was—contended that the requirement did not apply because troops were dispatched without the intent that they engage in hostilities.

If this record does not satisfy Congress and it decides to seek more effective consultation, it can specify by law what kind of consultation is required, and in what circumstances.<sup>192</sup> After the *Mayaguez* incident, Senator Eagleton did introduce a measure that would have required the President to "seek the advice and counsel of the Congress" instead of merely requiring him to consult,<sup>193</sup> but it was not brought to a vote. The Eagleton amendment would also have defined the "advice and counsel" the President must seek, by imposing a duty on the President, "before taking any steps which would firmly commit United States Armed Forces to hostilities," to "discuss fully"

<sup>184</sup> *Id.*, May 14, 1984, at A12, col. 3.

<sup>185</sup> See *supra* note 147.

<sup>186</sup> See Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Powers*, 71 AJIL 605, 615-16 (1977); see also *infra* note 227 and accompanying text.

<sup>187</sup> Franck, *supra* note 186, at 617-18.

<sup>188</sup> *Id.* at 619.

<sup>189</sup> *Id.* (citing N.Y. Times, May 16, 1975, at 15, col. 2).

<sup>190</sup> For evidence of lack of consultation regarding the Iran mission, see N.Y. Times, Apr. 27, 1980, §1, at 17, col. 1. For the lack of consultation concerning the sending of U.S. Marines back to Beirut in September, 1982, see *id.*, Sept. 21, 1982, at A1, col. 6. When 550 U.S. personnel were sent to Chad in August 1983, during the civil war, the administration only notified Congress after the fact. Wash. Post, Aug. 9, 1983, at A11, col. 3.

<sup>191</sup> "We weren't asked for advice," House Speaker Thomas P. O'Neill, Jr., said. "We were informed what was taking place." N.Y. Times, Oct. 26, 1983, at A16, col. 1.

<sup>192</sup> For further discussion of methods of strengthening executive-legislative consultations, see Franck, *supra* note 186, at 638; see also STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 98TH CONG., 1ST SESS., STRENGTHENING EXECUTIVE-LEGISLATIVE CONSULTATION ON FOREIGN POLICY 49-70 (Comm. Print No. 8, 1983).

<sup>193</sup> S. 1790, 94th Cong., 1st Sess., 121 CONG. REC. 15,580 (1975).

the proposed action with members of Congress and "fully consider their advice and counsel."<sup>194</sup>

## VII. USING THE RULES OF PROCEDURE

### *The "Point of Order" Alternative*

Even were Congress to define "consultation" more precisely, that would not guarantee more than pro forma compliance. As noted, statutory words mean whatever their final implementor says they mean. After *Chadha*, Congress has few ways to make itself a mandatory part of that final process of implementation. It could, however, attach a penalty to what it regards as a serious misreading of its statutory intent by the little-tested expedient of using its rules of procedure. Recourse to the rules, rather than legislating, permits a majority of the legislators to act without presentment to the President because, under Article I, section 5, clause 2 of the Constitution, each House of Congress, acting alone, has the power to determine its rules and procedures. Indeed, the *Chadha* decision specifies this as one of the few instances in which Congress, without presentment, can achieve a binding determination.<sup>195</sup> The President cannot veto a House or Senate rule. Thus, each chamber might adopt a rule that would trigger a point of order against any bill that funds a program the President has implemented without, in Congress's opinion, having satisfied a statutory requirement such as that for prior consultation. When raised by any member, a point of order requires consideration of a bill to halt<sup>196</sup> while the presiding officer, after limited debate, decides on its validity.<sup>197</sup> If the point of order is not overruled, further consideration of the bill is not in order.<sup>198</sup>

Of course, even without such a rule, Congress can refuse to vote funds for a program undertaken without adequate consultation. However, the point of order procedure makes this result much easier to achieve. Strangely, the point of order procedure, while frequently employed to bar consideration of a bill reported by a committee without subject matter jurisdiction,<sup>199</sup> has not so far been used in this way. In a draft amendment<sup>200</sup> to the Foreign Relations Authorization Act for fiscal year 1979,<sup>201</sup> it was proposed that a point of order should lie against any bill to authorize or appropriate funds to carry out an executive agreement that the Senate had previously determined ought to take the form of a treaty.<sup>202</sup> That proposal was not adopted, although the Senate Foreign Relations Committee,<sup>203</sup> citing the Supreme

<sup>194</sup> *Id.*

<sup>195</sup> *Chadha*, 462 U.S. at 955 n.20.

<sup>196</sup> PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES, ch. 31, §1, at 697 (1982) (loose-leaf ed.).

<sup>197</sup> *Id.* §6, at 702.

<sup>198</sup> *Id.* §1, at 697.

<sup>199</sup> See, e.g., *id.* §1.7, at 697.

<sup>200</sup> S. 3076, 95th Cong., 2d Sess., §502 (1978), cited in 1 UNITED STATES FOREIGN RELATIONS LAW 461, 463-66 (T. Franck & M. Glennon eds. 1980).

<sup>201</sup> Pub. L. No. 95-426, 92 Stat. 963 (1978).

<sup>202</sup> S. 3076, *supra* note 200, §502(f)(1).

<sup>203</sup> See Franck & Glennon (eds.), *supra* note 200, at 469-74.

Court's opinion in *United States v. Ballin*,<sup>204</sup> supported the amendment's constitutionality.<sup>205</sup> Opponents of the proposal, however, have argued that it was actually not a procedural rule at all.<sup>206</sup> Armed with the reasoning of *Chadha*, opponents will insist that the effect of implementing such a rule is "legislative," in that it constitutes "action that had the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials . . . , . . . outside the legislative branch."<sup>207</sup> As such, it would be no more than a tainted effort to do indirectly what cannot be done directly.

### *Expedited Procedures*

A less controversial use of the rules of procedure relates to Congress's capacity to take advantage of report and wait provisions (see above). Even before *Chadha*, it was apparent that Congress's ability to influence executive conduct by resolution was limited by the legislative calendar and the glacial pace of the institutional process. That limitation, however, can be ameliorated by procedures that cut through the logjams. Thus, shortly before *Chadha*, the Senate passed a bill that attempted to transform veto provisions in the Consumer Product Safety Act<sup>208</sup> into congressional rules of procedure featuring expedited consideration mechanisms.<sup>209</sup> Moreover, in connection with the Angola cutoff,<sup>210</sup> the Senate provided that a resolution reinstating aid to anti-Government forces within 30 days of a presidential certification would be entitled to preferential consideration.<sup>211</sup> This meant that any member of the relevant committee could move its discharge after 10 days.<sup>212</sup> Such a

<sup>204</sup> 144 U.S. 1 (1892).

<sup>205</sup> Congress

may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.

*Id.* at 5.

<sup>206</sup> The Executive argued that the typical uses of a point of order are triggered by an intramural event: to prevent consideration of an authorization bill after May 15 (Senate), an appropriations bill that contains general legislation (Senate) or any bill whose subject matter falls outside the jurisdiction of the committee considering it. Letter from Department of State to Senate Foreign Relations Committee, Dec. 30, 1977 (presenting views in opposition to S. Res. 24), reprinted in Franck & Glennon (eds.), *supra* note 200, at 453.

<sup>207</sup> *Chadha*, 462 U.S. at 952.

<sup>208</sup> 15 U.S.C. §§2051-2083, 2083 (1982).

<sup>209</sup> S. 861, 98th Cong., 1st Sess., 129 CONG. REC. S8652-55 (daily ed. June 16, 1983) (passed by Senate). The bill simply amended the existing legislative veto over Consumer Product Safety Commission rules by adding a section stating that the veto is enacted as "an exercise of the rulemaking power" of both Houses of Congress. See also *supra* notes 165 and 175 for the House Consumer Product Safety bill, which contained both affirmative and negative report and wait provisions meant to replace the veto provision invalidated by *Chadha*.

<sup>210</sup> See *supra* note 174 and accompanying text.

<sup>211</sup> Pub. L. No. 94-329, §601, 90 Stat. 729, 765-66 (1976). Expedited procedures for the House are found at 22 U.S.C. §2776(b) (1982).

<sup>212</sup> Pub. L. No. 94-329, *supra* note 211, §601(b)(3)(A).

motion, being privileged, is entitled to immediate consideration<sup>213</sup> and debate is limited to 1 hour, with all amendments barred.<sup>214</sup> Once the resolution reaches the Senate floor, debate is limited to 10 hours, with a ban on all amendments or motions to recommit.<sup>215</sup>

A 1983 amendment to the War Powers Resolution proposed by Senator Alan Cranston<sup>216</sup> called for even more expeditious procedures. If more than one-third of the members of either House of Congress were to introduce a resolution allowing, or forbidding, the President to continue military operations, that resolution must emerge from committee no later than 1 day following its introduction,<sup>217</sup> to be voted upon within 3 calendar days.<sup>218</sup> The use of expedited procedures in connection with report and wait devices would make more realistic the leverage Congress seeks to gain, although they are effective only as long as they are used sparingly.

### VIII. THE POWER OF THE PURSE

In seeking to co-determine U.S. foreign policy, Congress is on firmest constitutional ground when it deploys its undoubted discretion over government spending. Article I, section 9, clause 7 of the Constitution establishes that no money shall be appropriated except by act of Congress. The only explicit limit on this power is found in Article II, section 1, clause 7 and Article III, section 1, by which Congress is precluded from cutting the salaries of incumbent Presidents and Supreme Court Justices. Despite frequent use of spending curbs to limit executive discretion, the Supreme Court has never found the practice invalid.<sup>219</sup>

Congress thus has a powerful instrument at its disposal which can be used as a partial replacement for the legislative veto. When attached to an authorization—the foreign assistance law, for example—a spending limitation remains in effect throughout the life of the law, or until it is deleted by amendment. On the other hand, if Congress imposes the limit by a “rider” to an appropriations bill, the limit, like the appropriation, applies only to the designated fiscal year. Nevertheless, as noted, the rider has the advantage, from Congress’s perspective, of being difficult for the President to veto when it is attached to an inextricable part of an urgently needed package of funding.<sup>220</sup>

Limitations can take the form of a country prohibition, as, for example, on the use of funds for any military activities in, or support for, a designated

<sup>213</sup> *Id.* §601(b)(3)(B).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* §601(b)(4).

<sup>216</sup> S. 1906, 98th Cong., 1st Sess., 129 CONG. REC. S13,245 (daily ed. Sept. 29, 1983).

<sup>217</sup> *Id.* §7.

<sup>218</sup> *Id.*

<sup>219</sup> See Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1, 29–30 (1975).

<sup>220</sup> But see President Carter’s veto of the 1981 appropriations bill for the State, Justice and Commerce Departments, H.R. 7584, 96th Cong., 2d Sess. (1980), because it contained an amendment that forbade the Justice Department from bringing suits that might result in forced busing of schoolchildren. See 16 WEEKLY COMP. PRES. DOC. 2809 (Dec. 13, 1980).



country.<sup>221</sup> Or the prohibition can apply to a designated type of activity, such as U.S. troop involvement in Cambodia, passed by Congress in 1971,<sup>222</sup> or, 2 years later, aerial bombing of the same country.<sup>223</sup> The device can also be used to issue contingent warnings of future consequences, in an effort to deter conduct. Thus, the Department of State Authorization Act of 1982-1983<sup>224</sup> includes a section that would cut off U.S. payments to UNESCO if the organization were to adopt "New Information Order" policies limiting journalistic freedom.<sup>225</sup> Senator Cranston's proposed post-*Chadha* amendment to the War Powers Resolution would have prohibited any funds from being expended for the conduct of hostilities except in enumerated circumstances.<sup>226</sup>

Appropriations cutoffs did help to end U.S. involvement in the Angolan civil war and the Vietnam War. In several instances, however—the evacuations from Saigon, Da Nang and Phnom Penh and the *Mayaguez* incident—the President simply ignored a funding prohibition, justifying his actions as exercise of inherent executive powers in the foreign relations and war-making areas.<sup>227</sup> A clash is likely when Congress uses its constitutionally rooted power of the purse to restrict a constitutionally derived plenary presidential power such as that pertaining to the "making" (i.e., negotiating) of treaties, the appointing and receiving of ambassadors and the command of the armed forces.<sup>228</sup>

Congress provoked such a clash with a 1980 law that forbade the closing, or required the reopening, of ten U.S. consulates that President Carter had shut down for reasons of economy.<sup>229</sup> The President, in signing that bill, said he would treat the provision as nothing more than a recommendation, citing his constitutional prerogative to designate ambassadors together with an "[i]mplicit" power to decide "when and where an Ambassador or Consul should be appointed."<sup>230</sup> In its next State Department authorization bill,<sup>231</sup> Congress replied by prohibiting any funds from being spent to open new consulates anywhere until after the reopening of seven designated consulates

<sup>221</sup> See, e.g., 22 U.S.C. §2370(f) (1982) (containing a prohibition on aid to any Communist country, including 18 listed in the law).

<sup>222</sup> Pub. L. No. 91-652, §7(a), 84 Stat. 1942, 1943 (1971).

<sup>223</sup> Pub. L. No. 93-52, §108, 87 Stat. 130, 134 (1973).

<sup>224</sup> Pub. L. No. 97-241, 96 Stat. 273 (1982) (codified as amended in scattered sections of 18 and 22 U.S.C.).

<sup>225</sup> 22 U.S.C. §287r note (1982).

<sup>226</sup> S. 1906, 98th Cong., 1st Sess. §5 (1983).

<sup>227</sup> See President Ford's messages to Congress about the evacuations from Southeast Asia, 121 CONG. REC. 12,803-04 (1975) (Saigon), *id.* at 10,065 (Phnom Penh), and *id.* at 9079 (Da Nang) (Ford also based this action on provisions in the Foreign Assistance Act of 1961 authorizing humanitarian aid to refugees), *cited in* W. REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS 249 (1981).

<sup>228</sup> See L. HENKIN, *supra* note 110, at 114.

<sup>229</sup> Department of State Authorization Act for 1980-81, Pub. L. No. 96-60, §108, 93 Stat. 395, 397 (codified in scattered sections of 5, 16 and 22 U.S.C., 22 U.S.C. §2656 note (1982)).

<sup>230</sup> 15 WEEKLY COMP. PRES. DOC. 1434 (Aug. 15, 1979).

<sup>231</sup> See *supra* note 224.

closed by Carter.<sup>232</sup> Signing this bill, President Reagan, too, said he would treat the provision as recommendatory.<sup>233</sup> Despite the tough presidential stance, however, the Reagan administration quickly negotiated with the seven countries involved,<sup>234</sup> which led to the reopening of all but one. Only then did Congress lift its fiscal ban.<sup>235</sup>

In other recent cases, too, Congress has used its power of the purse to affect a presidential prerogative. The Department of State authorization for 1982-1983,<sup>236</sup> for instance, contained a section requiring the United States to reduce its contribution to the United Nations by an amount equal to its assessed share of the costs for several Palestinian rights programs.<sup>237</sup> In response to this measure, the administration stated that it understood "the action of the Congress in signalling our total disapproval [*sic*] at the use of U.N. funds."<sup>238</sup> The administration also stated that it would attempt to end UN expenditures for the Palestine Liberation Organization.<sup>239</sup> In this instance, the Executive clearly approved Congress's goals. By obeying that funding restriction, it could be argued, the President did not so much recognize the authority of Congress as agree with its policy recommendation. Such interactions, therefore, are not conclusive as to the constitutional issues they raise. As for court decisions in this gray area, they are confined primarily to the tangential issue of impoundment.<sup>240</sup>

<sup>232</sup> *Id.*, §103, 22 U.S.C. §2656 note (1982).

<sup>233</sup> 18 WEEKLY COMP. PRES. DOC. 1060 (Aug. 24, 1982).

<sup>234</sup> Telephone interview with Gene Molmberg, Assistant Secretary for Management, Office of the Legal Adviser, Department of State, Apr. 4, 1984.

<sup>235</sup> The State Department reported to Congress that it had tried but failed to secure Burma's approval for the reopening of the Mandalay consulate. See Pub. L. No. 98-164, §137, 97 Stat. 1017, 1030, 22 U.S.C. §2656 note (1982).

<sup>236</sup> See *supra* note 224.

<sup>237</sup> *Id.* §104, 96 Stat. at 274.

<sup>238</sup> 1982 U.S. CODE CONG. & AD. NEWS 666 (legislative history of Pub. L. No. 97-241).

<sup>239</sup> *Id.*

<sup>240</sup> In *Kendall v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), the Supreme Court's earliest treatment of the impoundment issue, the Court dismissed the Executive's contention that "the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution." *Id.* at 612. However, the *Kendall* opinion rested on a narrow set of facts. (The case involved a disputed payment to a government contractor. Congress passed a bill directing the Postmaster General to pay the contractor any sum determined by an arbitrator. After the arbitrator's determination, however, the Postmaster refused to pay the sum and instead paid a lesser amount. *Id.* at 527-32. In response, the Court issued a writ of mandamus requiring payment of the full amount, thereby upholding Congress's power to control expenditures.) Impoundment has continued as a regular, though infrequent, executive practice. See L. FISHER, *PRESIDENTIAL SPENDING POWER* 165-66 (1975) (citing impoundments by Presidents Grant, Harding, Truman, Johnson and others). Under President Nixon, the use of impoundments became "unprecedented in . . . scope and severity." *Id.* at 176. In effect, Nixon converted impoundment into a de facto veto power—a veto power free of Congress's usual authority to override by a two-thirds majority vote. This prompted judicial challenges and legislative action. In *Train v. City of New York*, 420 U.S. 35 (1975), the Supreme Court indicated that it would determine the propriety of impoundment on a case-by-case basis, by examining the legislative history of the statute in question. The Court examined whether the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251 *et seq.* (1982), required or merely permitted the President to spend the full amount of money authorized for a designated purpose. *Train*, 420 U.S. at 42-48. Congress thereafter passed the Impoundment

The practicalities are likely to determine Congress's future use of the fiscal option. As Louis Fisher has written in a work generally critical of the growth of presidential spending authority: "The realities and complexities of public policy require executive discretion for the sound management of public funds."<sup>241</sup> The allocation of revenues in countless little satchels, each with tightly pulled legislative drawstrings, is not a feasible way for a world-class power to attend to global responsibilities. Moreover, a public signal by Congress to the President restricting his discretion is also a signal that can be read by America's enemies as an invitation to act. Also of practical importance is the difficulty Congress has in enforcing a spending limitation or even in understanding the fiscal origins of a presidential initiative. At times, the Executive has taken advantage of lump sum budgeting to engage in unauthorized conduct or to reprogram funds for purposes not yet approved by, or even known to, Congress.<sup>242</sup> For example, President Nixon spent \$100 million of transferred funds on the secret bombing of Cambodia before having to inform Congress in order to secure additional money.<sup>243</sup> In still other instances, the Pentagon has reprogrammed money to build weapons systems that Congress has not yet approved.<sup>244</sup>

It must also be noted that some of the statutes that have transferred wide discretion to the Executive, subject to the now defunct legislative veto, do not involve significant spending. For instance, while the International Security Assistance and Arms Export Control Act<sup>245</sup> authorizes the Executive to license the export of private arms and nuclear materials,<sup>246</sup> the license is issued at virtually no cost.<sup>247</sup> Finally, the use of appropriations restrictions as a substitute for the legislative veto may also have the undesirable side effect of transferring power to appropriations committees from those com-

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Control Act of 1974, 2 U.S.C. §§681-688 (1982), which provides that the President may terminate or reduce funding for a congressionally authorized program only if he receives congressional approval by joint resolution within 45 days after he submits a message to Congress requesting such a termination. *Id.* §683. The President may also defer expenditures subject to a one-House legislative veto of disapproval. *Id.* §684. The latter is clearly unconstitutional after *Chadha*, while the former survives *Chadha* by virtue of its joint resolution provision.

<sup>241</sup> L. FISHER, *supra* note 240, at 262.

<sup>242</sup> *Id.* at 66-71.

<sup>243</sup> *Id.* at 107.

<sup>244</sup> *Id.* at 92.

<sup>245</sup> 22 U.S.C. §§2751-2796 (1982).

<sup>246</sup> *Id.* §2776(c).

<sup>247</sup> Moreover, use of the appropriations power to prevent the issuance of individual export licenses might violate the Constitution's ban on bills of attainder, art. I, §9, cl. 3. The Supreme Court has defined a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977). However, a regulatory statute that incidentally imposes deprivations on individuals would probably not be considered a bill of attainder. To violate the ban on bills of attainder, the legislature must pass a bill motivated by some stigmatizing or condemnatory purpose directed against a distinct individual or group. *United States v. Brown*, 381 U.S. 437 (1965); see also *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 104 S.Ct. 3348, 3357 n.15 (1984). The desire to control arms exports, even when it deprives certain exporters of their livelihood, is thus unlikely to be characterized as unconstitutional. For the Supreme Court's latest thinking on bills of attainder, see the *Selective Service* case. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 484-501 (1978).

mittees—foreign relations, defense or trade—which are staffed to have expertise and to exercise policy control.<sup>248</sup>

Each of these considerations argues for use of the power of the purse only in extreme circumstances. Those in which the use of this device may be warranted pertain to activities that are likely to be of long duration, are easily targetable in legislative specifics and are likely to require huge sums of money that might, if not prevented, become available out of one of the readily reprogrammable, or secret, reservoirs of funding.

### IX. SHORTENING THE LEASH

For less extreme situations, Congress, conceivably, could replace the legislative veto by delegating authority more parsimoniously. In many important areas of foreign relations, the Executive has little independent constitutional authority.<sup>249</sup> Instead, it is empowered solely by congressional delegation, the terms of which can be altered by amending the appropriate law.

One important example is foreign aid. The Constitution's spending clause<sup>250</sup> gives Congress the power to decide how to set priorities and allocate funds among recipient states and even among projects.<sup>251</sup> In the Foreign Assistance Act of 1961,<sup>252</sup> Congress delegated much of this power to the Executive, reserving for itself the power to veto any particular expenditure by concurrent resolution.<sup>253</sup> With that device gone, Congress, theoretically, could rescind the Foreign Assistance Act and design its own aid program on a country-by-country or item-by-item basis, leaving the President with no significant discretion. In practice, however, this would prove highly impractical. For Congress to develop the expertise necessary to legislate in such detailed fashion would take years and would require the creation of a new, duplicative, bureaucracy. Moreover, keeping the legislation responsive to changing opportunities and new challenges would occupy large amounts of congressional time. That, in turn, could subject legislators to intense lobbying by interest groups, and lead to political deadlock and paralysis. Nonetheless,

<sup>248</sup> *Hearings*, *supra* note 144, at 35 (statement of Stanley M. Brand, Gen. Counsel to the Clerk, House of Reps.).

<sup>249</sup> For a listing of areas in which the President's authority has a basis in the constitutional text, see *infra* note 274 and accompanying text. Presidential powers not enumerated in that list do not necessarily have a basis in congressional delegations. Instead, they may represent a slow accretion of power by the President over many years. See the discussion of the President's claimed power as "sole organ" of foreign policy in L. HENKIN, *supra* note 110, at 45-50.

<sup>250</sup> U.S. CONST. art. I, §8, cl. 1.

<sup>251</sup> See L. HENKIN, *supra* note 110, at 113-14 (because the Constitution gives Congress control over spending in the "general Welfare of the United States," Congress can impose conditions on its use even if they infringe to some extent on the President's power over foreign relations); but see *id.* at 109 (questioning Wallace, *The President's Exclusive Foreign Affairs Power over Foreign Aid*, 1970 DUKE L.J. 293 (foreign aid has become so much a part of foreign policy that the President should have as much authority in this area—and Congress as little—as in most other areas of foreign affairs)).

<sup>252</sup> Pub. L. No. 87-195, 75 Stat. 424 (codified as amended in scattered sections of 7, 16, 22 and 42 U.S.C.).

<sup>253</sup> 22 U.S.C. §2367 (1982).

in the wake of *Chadha*, a catchall bill was introduced in Congress that calls for the rescission of all delegated presidential authority formerly subject to a legislative veto.<sup>254</sup> It speaks not to the practicality of this option but, rather, the frustration of Congress at its lack of feasible alternative options.

A less radical variation on this strategy would replace the broad delegations currently in invalid statutes, or statutes with invalid congressional vetoes, with narrower standards, defined by limits on duration, or by qualitative or quantitative restrictions.<sup>255</sup> Such limitations would probably fall into three general categories: those curtailing the amount of money the President could spend, or the amount of time within which the President could act or the type of actions the President could take. Congress, previously, has used all three types. The Foreign Assistance Act,<sup>256</sup> for example, precludes the President from spending more than \$100 million in aid on any single "productive enterprise" without express congressional approval.<sup>257</sup> As noted, the War Powers Resolution allows the President to make war, but only for 60 to 90 days, subject to extension by Congress.<sup>258</sup> Finally, the Foreign Assistance Act also contains a subsection prohibiting the President from aiding 18 specified Communist nations.<sup>259</sup>

Utilizing these earlier examples, Congress could rewrite various statutes to authorize the President to spend up to limited dollar thresholds, beyond which his authority would have to be extended legislatively, item by item. Such a ceiling has been proposed for presidential authority to extend military aid.<sup>260</sup> Congress could also give the President broad spending powers in respect of certain foreseeable activities—military aid to a list of traditionally friendly and/or democratic nations, for example—while extending only more limited authority in respect of the rest.

Limitations on the time within which the President has authority to act are already found in some of the Type IV legislative control devices described above. Some of these "sunset" provisions are in the form of time limits set by the statute. In other instances, such as the War Powers Resolution, the clock begins to run on the happening of a specified event.<sup>261</sup> In the aftermath of *Chadha*, several pieces of legislation have been proposed that include "sunset" provisions as a means of replacing the legislative veto. One would

<sup>254</sup> Rescission could be avoided only if Congress specifically authorized continuation of a presidential authority by joint resolution within 180 days of the proposed catchall bill's passage. H.R. 4535, 93th Cong., 1st Sess., 129 CONG. REC. H10,589-91 (daily ed. Nov. 18, 1983).

<sup>255</sup> See discussion of delegation doctrine, *supra* notes 130-141 and accompanying text.

<sup>256</sup> Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended in scattered sections of 7, 16, 22 and 42 U.S.C.).

<sup>257</sup> 22 U.S.C. §2370(k) (1982). See generally the discussion of the appropriations alternative, *supra* notes 219-248 and accompanying text.

<sup>258</sup> 50 U.S.C. §1544 (1982).

<sup>259</sup> See *supra* note 221. For a listing of other instances in which Congress has amended the Foreign Assistance Act to place restrictions on countries that could receive foreign aid, see L. HENKIN, *supra* note 110, at 114.

<sup>260</sup> See generally *Hearings*, *supra* note 144, at 36-47.

<sup>261</sup> The President's filing of a report on the introduction of U.S. armed forces into hostile areas. 50 U.S.C. §§1543, 1544 (1982).

amend the Export Administration Act of 1979,<sup>262</sup> which grants the President power to impose agricultural export controls,<sup>263</sup> by terminating the controls after 60 days unless they are extended by joint resolution of Congress.<sup>264</sup>

In addition to adopting such "sunset" provisions, Congress may also prevent the Executive from exercising certain delegated powers until after a period of time has elapsed. In one instance, the 1984 Department of Defense Authorization Act,<sup>265</sup> Congress included a provision prohibiting the Secretary of Defense, for 8 months, from issuing any regulation expanding the use of lie detector tests for civilian employees of the Defense Department or members of the military.<sup>266</sup> Meanwhile, Congress is to conduct hearings examining executive proposals to expand testing.<sup>267</sup> Such a moratorium, with its implicit threat to extend its duration unless agreement is reached, increases congressional leverage in negotiating with the Executive.

Another example of reducing the scope of delegated presidential authority after *Chadha* is Senator Cranston's aforementioned proposed amendment to the War Powers Resolution. Closely resembling Senator Javits's original draft of a decade ago,<sup>268</sup> it would have Congress enumerate the circumstances in which a President may introduce troops abroad without a congressional declaration of war: to repel or "forestall the direct and imminent threat" of an attack upon the United States or U.S. armed forces stationed abroad; to protect U.S. citizens while evacuating them from a country where they are subject to a direct and imminent threat to their lives; and pursuant to statutory authorization.<sup>269</sup> These *a priori* limits contrast with the current War Powers Resolution, which merely establishes *post facto* procedures for terminating ongoing military activity,<sup>270</sup> but establishes no binding standards.

Narrow delegations of greater specificity, while not immune to challenge on constitutional grounds, do offer an alternative to the legislative veto as a way to retain Congress's role as a partner in the foreign relations enterprise. In practice, however, even experts in semiotics would be daunted by the task of drafting standards that could not lead to differences of construction between the branches in specific instances. Congress might then be left with few additional cards to play, given the reluctance of the courts to serve as arbiters in such conflicts (see below). Another problem with trying to narrow delegated authority is stated by Justice White in his *Chadha* dissent: "While Congress could write certain statutes with greater specificity, it is unlikely that this is a realistic or even desirable substitute for the legislative veto. The controversial nature of many issues would prevent Congress from

<sup>262</sup> Pub. L. No. 96-72, 93 Stat. 503 (codified as amended in scattered sections of 7, 22, 26, 42 and 50 app. U.S.C.).

<sup>263</sup> 50 U.S.C. app. §2406 (1982).

<sup>264</sup> S. 979, 98th Cong., 2d Sess., 130 CONG. REC. S1966 (daily ed. Feb. 29, 1984) (amendment of Sen. Dixon) (passed Senate, Mar. 1, 1984; passed House, Mar. 8, 1984).

<sup>265</sup> Pub. L. No. 98-94, 97 Stat. 614.

<sup>266</sup> *Id.* §1218, 97 Stat. at 690.

<sup>267</sup> See 129 CONG. REC. S10,145 (daily ed. July 15, 1983).

<sup>268</sup> S. 2956, 92d Cong., 1st Sess. (1971).

<sup>269</sup> S. 1906, 98th Cong., 1st Sess. §3, 129 CONG. REC. S13,245 (daily ed. Sept. 29, 1983).

<sup>270</sup> 50 U.S.C. §§1543-1545 (1982).

reaching agreement on many major problems if specificity were required in their enactments."<sup>271</sup> Even more serious is the prospect of policy paralysis that could result from a serious reduction in the President's ability to respond flexibly to unexpected opportunities and urgent dangers.

If, however, Congress does decide to utilize its option to narrow delegation, it could mitigate its rigidifying effects by also providing accelerated procedures for legislative waiver (see above), and even by adding procedures for presidential waiver in certified circumstances of extraordinary necessity. Such waiver procedures are currently found in provisions requiring the suspension of military aid to governments guilty of gross and habitual human rights abuses.<sup>272</sup> The deliberate misapplication of such escape clauses<sup>273</sup> may be curbed by requiring congressional confirmation (by joint resolution) of a presidential waiver after an initial grace period.<sup>274</sup>

## X. JUDICIAL RESOLUTION OF CONGRESSIONAL-EXECUTIVE CONFLICTS

### *The Problem*

Narrower standards are only as restricting as those charged with applying them think they are. The legislative veto brought Congress into this interpretative process as coequal partner with the Executive. By forcing Congress out, the Supreme Court, in *Chadha*, may have impelled the courts, however reluctantly, to enter the interpretative thicket unless legislative standards are simply to mean whatever the Executive says they mean.<sup>275</sup>

By striking down the legislative veto, the Supreme Court may have compelled the legislative branch to express its intent through more carefully defined delegations of discretion to the Executive, hedged with strict stan-

<sup>271</sup> See *Chadha*, 462 U.S. at 973 n.10 (citing Fuchs, *Administrative Agencies and the Energy Problem*, 47 IND. L.J. 606, 608 (1972); Stewart, *Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695-96 (1975)).

<sup>272</sup> See, e.g., 22 U.S.C. §2370 note (1982) (military aid to El Salvador conditioned on semiannual certification of human rights progress by President).

<sup>273</sup> The history of presidential certifications of human rights progress in El Salvador demonstrates that such escape clauses can easily undermine the purposes of an aid ban. The President's semiannual certification of progress on human rights in El Salvador (*id.*) has been branded a charade (see N.Y. Times, Dec. 1, 1983, at A1, col. 5), as gross violations by Salvadoran death squads continue. See *id.*, Nov. 26, 1983, at 4, col. 3. When the President pocket vetoed a bill renewing the certification process, however, even critics of the process admitted that it had some beneficial effects. It drew American public attention to human rights conditions in El Salvador and reduced political killings, although only in the days immediately surrounding a certification. See *id.*, Dec. 1, 1983, at A1, col. 5.

<sup>274</sup> Clearly, the narrowing of presidential discretion by imposing legislatively mandated standards is a device available to Congress only with respect to *delegated* or *concurrent* powers of the President, and not to his inherent or plenary powers. Professor Henkin lists the following as "expressed, unambiguous grants to the President": the power to make treaties, to appoint and receive ambassadors, to command the armed forces and to see that the laws are faithfully executed. L. HENKIN, *supra* note 110, at 93. Given this modest list, congressional attempts to reduce presidential power by narrowing statutory delegations could have quite wide application.

<sup>275</sup> While recourse to "points of order" procedures could conceivably restore a modicum of congressional co-determination, their constitutionality is uncertain, and legislators are sure to feel uncomfortable resorting to such unaccustomed devices except in extreme circumstances.

dards that invite judicial review. If so, the courts, which have long been uncomfortable in the field of foreign affairs, may have to rethink their abstemiousness when they are called upon to umpire disputes that raise fundamental balance-of-power questions. Chief Justice Burger could have been signaling a comprehension of this when he wrote in his *Chadha* opinion:

Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress. . . . But "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."<sup>276</sup>

Even if it proves overly optimistic to expect the courts to volunteer for this role, Congress may nevertheless try to compel greater judicial intervention by using its constitutional authority over federal courts<sup>277</sup> to enact legislation making justiciable such disputes<sup>278</sup> as might arise from application of strict standards like those elaborated in Senator Cranston's proposed version of the War Powers Resolution.<sup>279</sup>

Before examining whether it is practicable and constitutional for Congress to do this, we will review the traditional reluctance of courts to become involved in questions pertaining to the use of the foreign relations power.

#### *The Political Question Doctrine*

That reluctance is embodied primarily in the "political question" doctrine, a judicially created rule by which courts decline jurisdiction, deferring to the political branches of government.<sup>280</sup> In *Baker v. Carr*, the Supreme Court

<sup>276</sup> *Chadha*, 462 U.S. at 943 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>277</sup> See U.S. CONST. art. III, §2, cl. 2 (appellate jurisdiction in the Supreme Court "with such Exceptions, and under such Regulations as the Congress shall make"); *id.*, art. I, §8, cl. 18 (necessary and proper clause). See also *id.*, art. I, §8, cl. 9 (power to constitute tribunals inferior to the Supreme Court); *id.*, art. III, §1 (judicial power vested in Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish").

<sup>278</sup> See, e.g., 22 U.S.C. §2370(e)(2) (1982) (the "Hickenlooper Amendment"), discussed *infra* at notes 317-332 and accompanying text.

<sup>279</sup> Such a statutory provision might read:

No court in the United States shall decline, on ground that it is a nonjusticiable or political question, to make a determination on the merits, giving effect to the Constitution of the United States and to this resolution, in any case in which a claim of *ultra vires* is asserted against the President as Commander in Chief by Congress or an appropriate congressional committee, in an action arising out of the introduction by the President of the armed forces into hostilities.

See discussion of such a provision in Franck, *supra* note 186, at 640.

<sup>280</sup> Early Supreme Court cases embodying the political question doctrine include *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.) ("Questions, in their nature political . . . can never be made in this court"); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (refusal to decide whether treaty had been broken); and the celebrated case of *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (refusal to recognize either of rival claimants as lawful state government).



identified those questions which were appropriate for judicial reticence.<sup>281</sup> The conduct of foreign policy has proven especially vulnerable to application of the doctrine, sometimes by sweeping judicial dicta to the effect that all questions touching foreign relations are political questions.<sup>282</sup> In *Baker v. Carr*, for example, the Court explained that foreign policy disputes "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature," and that "many such questions uniquely demand single-voiced statement of the Government's views."<sup>283</sup>

"Yet," the same Court warned, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."<sup>284</sup> Which issues, then, are not beyond the courts' reach? One answer is suggested by Justice Jackson in the *Steel Seizure* case, namely, that judicial deference in foreign policy disputes may be significantly lessened in a dispute directly engaging the political branches themselves, particularly if one branch is alleging the usurpation of its constitutional authority by the other.<sup>285</sup> Judicial deference, after all, if owed at all, is owed equally to *both* political branches. When they act in harmony, their power is at the flood. When they oppose each other, judicial deference inevitably operates to favor one over the other, making deference meaningless.<sup>286</sup>

<sup>281</sup> 369 U.S. 186 (1962). The decision identifies as qualifying for judicial reticence those questions which have one or more of the following elements:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

<sup>282</sup> See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), where the Court stated: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." In *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), Justice Jackson articulated the Court's reluctance to decide issues involving foreign policy:

Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

<sup>283</sup> 369 U.S. at 211.

<sup>284</sup> *Id.*

<sup>285</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635–38 (Jackson, J., concurring); see *supra* note 129 and accompanying text.

<sup>286</sup> 343 U.S. at 635–38; see also *supra* note 129 and accompanying text. In several recent cases, though not involving foreign affairs, the Court has demonstrated its willingness to decide

The political question doctrine may thus be seen as an obstacle to judicial umpiring, but not necessarily an insurmountable one. Both parts of this proposition are illustrated by the response of federal courts to numerous lawsuits challenging the legality of the Vietnam War.<sup>287</sup> In an early case, *Luftig v. McNamara*,<sup>288</sup> the district court dismissed a suit by an army private seeking to block his dispatch to Vietnam on constitutional grounds because "this is obviously a political question that is outside of the judicial function."<sup>289</sup> The court of appeals not only affirmed but warned other litigants that "resort to the courts is futile."<sup>290</sup>

A few years later, in *Atlee v. Laird*,<sup>291</sup> a class action challenged the constitutionality of the war. The majority opinion relied on the guidelines of *Baker v. Carr*<sup>292</sup> in declining to adjudicate.<sup>293</sup> The court found the issues nonjusticiable for lack of "judicially manageable standards" and because the court could not be expected to invite "consequences in our foreign relations completely beyond the ken and authority of this Court to evaluate."<sup>294</sup>

In 1971, however, in *Orlando v. Laird*,<sup>295</sup> the U.S. Court of Appeals for the Second Circuit expressed the view that "the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine."<sup>296</sup> Nevertheless, the court, on reaching the merits, found that the war had been endorsed by Congress—for example, through continued appropriations.<sup>297</sup> Two years later, in *Mitchell v. Laird*, the D.C. Circuit, while finding that the court could not "procure the relevant evidence" as to whether the President was "trying, in good faith and to the best of his ability," to bring to an end an undeclared war he had inherited,<sup>298</sup> reiterated the view that it is not necessarily "beyond

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whether one branch of the Government has impinged on the power of another. See *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982); *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *United States v. Nixon*, 418 U.S. 683 (1974). But see *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (order granting certiorari and vacating and remanding lower court ruling) (concurring opinion by Rehnquist, J., joined by three brethren, viewing as political question the roles of the President and Congress in conducting foreign relations).

<sup>287</sup> See generally Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 90-98 (1977); Ratner & Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A.L. REV. 715, 730-35 (1984).

<sup>288</sup> 252 F.Supp. 819 (D.D.C. 1966), *aff'd per curiam*, 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967).

<sup>289</sup> 252 F.Supp. at 819.

<sup>290</sup> *Luftig*, 373 F.2d at 665.

<sup>291</sup> 347 F.Supp. 689 (E.D. Pa. 1972) (three-judge court), *aff'd sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973).

<sup>292</sup> See *supra* note 281.

<sup>293</sup> *Laird*, 347 F.Supp. at 705-07. In considering the question of congressional authorization for a war, the court noted that Congress could "take steps short of a formal declaration of war, equivalent to an authorization." *Id.* at 706.

<sup>294</sup> *Id.* at 705.

<sup>295</sup> 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971).

<sup>296</sup> 443 F.2d at 1042.

<sup>297</sup> *Id.* at 1042-43.

<sup>298</sup> 488 F.2d 611, 616 (D.C. Cir. 1973).

judicial competence to determine the allocation, between the executive and the legislative branches, of the powers to wage war."<sup>299</sup>

*The War Powers Resolution and Judicially Manageable Standards*

These and other cases offer some basis for defining the circumstances in which Congress may expect to be able to turn to the courts. First, the legislature must have spoken with clear legislative standards, which, if violated, pose inescapable questions of constitutional usurpation. Second, it helps if Congress has taken "official action"<sup>300</sup> to assert its belief that these standards actually have been violated by the Executive in the particular instance.

The War Powers Resolution serves as an example. It reflects some of the lessons Congress thought it had learned from the Vietnam War and the earlier litigation.<sup>301</sup> Its sponsors made an attempt to define the respective war powers of the President and of Congress, although they failed to make that definition either exhaustive or binding.<sup>302</sup> In section 8(a)(1) the drafters also sought to rebut the kind of implied congressional assent that was decisive in *Orlando*.<sup>303</sup> The effort to use the new law to involve the courts has produced mixed results. In a district court case, *Crockett v. Reagan*,<sup>304</sup> 29 members of Congress sought to obtain a ruling against President Reagan's dispatch of 56 U.S. military advisers to El Salvador without recourse to the procedures for consultation, notification and termination mandated by the War Powers

<sup>299</sup> *Id.* at 614. See also *DaCosta v. Laird*, 471 F.2d 1146, 1156 (2d Cir. 1973) (dicta indicating possibility that a sufficiently manageable standard to allow judicial resolution might be present in a case in which the character of war operations was radically changed). See also *Holtzman v. Schlesinger*, 361 F.Supp. 553, 561-62 (E.D.N.Y. 1973) (Cambodian bombing enjoined after determination of justiciability), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). Nevertheless, the courts continued to treat as nonjusticiable the question of the adequacy of the form of Congress's assent to war making by the Executive. See, e.g., *Orlando v. Laird*, 443 F.2d at 1043-44.

<sup>300</sup> See *Goldwater*, 444 U.S. at 997-98 (Powell, J., concurring in the judgment) (official action by executive and legislative branches necessary before case can be considered ripe for judicial decision).

<sup>301</sup> See 119 CONG. REC. 1394 (1973) (statement of Sen. Javits) (bill "an effort to learn from the lessons of the last tragic decade of war which has cost our Nation so heavily in blood, treasure and morale").

<sup>302</sup> See, generally, on the issue of justiciability of the War Powers Resolution, Ratner & Cole, *supra* note 287, at 751-66. The standards for presidential war-making discretion are set out in §2(c), 50 U.S.C. §1541(c) (1982). The nonbinding character of the enumeration of presidential war powers is manifested by their placement in the "Purpose and Policy" section of the resolution rather than in an operative section, as well as by the fact that the standards are plainly not exhaustive, lacking any reference to rescuing citizens abroad or to using force in anticipation of imminent attack. See COMM. OF CONFERENCE, CONFERENCE REPORT ON THE WAR POWERS RESOLUTION, H.R. REP. NO. 547, 93d Cong., 1st Sess. (1973).

<sup>303</sup> 50 U.S.C. §1547(a)(1) (authority to introduce U.S. Armed Forces into hostilities may not be inferred from any provision of law including an appropriation act unless the provision specifically authorizes introduction). See also text at note 297 *supra*.

<sup>304</sup> 558 F.Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983). Since the contribution of the court of appeals is limited to affirming "the dismissal of this case for the reasons stated by the District Court," 720 F.2d at 1357, the analysis here will focus on the lower court opinion.

Resolution. While the court accepted that the plaintiffs were not seeking to have the judiciary "dictate foreign policy but rather to enforce existing law concerning the procedures for decision-making,"<sup>305</sup> it nevertheless held the issue nonjusticiable because the facts concerning the military situation in El Salvador were beyond its competence.<sup>306</sup> Judge Green did express the view, however, that, in another case involving "less elusive" facts, a court could order the President to comply.<sup>307</sup> She also added that, had Congress passed a resolution indicating that presidential notification was required by the law in those particular circumstances,<sup>308</sup> a judicial order requiring troop withdrawal might have issued.<sup>309</sup> She made clear that "the Court does not decide that all disputes under the War Powers Resolution would be inappropriate for judicial resolution."<sup>310</sup>

However, in a 1983 case, *Sanchez-Espinoza v. Reagan*,<sup>311</sup> a district court again applied the political question doctrine, asserting that "the covert activities of CIA operatives in Nicaragua and Honduras are perforce even less judicially discoverable than the level of participation by U.S. military personnel in hostilities in El Salvador."<sup>312</sup> The court did not echo Judge Green's view that clearer facts, or completed action by Congress, might make such issues litigable. Instead, it retreated to the more traditional position that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."<sup>313</sup>

This proposition, in turn, was put in doubt by an even more recent D.C. Circuit court holding—not directly implicating the War Powers Resolution—that the judiciary may enter a dispute over the alleged seizure in Honduras of an American's land at the instigation of the U.S. Government for the purpose of establishing a military training camp for Salvadoran troops.<sup>314</sup> The court took the position that where the Executive's activity, although plainly in pursuit of foreign policy objectives, is not authorized by an act of Congress or by the Constitution, it "usurps Congress's constitutionally granted powers of lawmaking and appropriation."<sup>315</sup> To further compound the confusion, the court seemed to give preference to this kind of dispute, in which private parties incidentally raised questions involving foreign policy, rather than those which involve direct confrontations between Congress and the President over the direction of that policy.<sup>316</sup> Following

<sup>305</sup> *Crockett*, 558 F.Supp. at 898.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 898-99.

<sup>308</sup> *Id.* at 899.

<sup>309</sup> *Id.* at 901. The court's finding that the 60-day termination provision requires Congress or a court to act affirmatively to start the time clock appears to misconstrue, and certainly to subvert the hope of "automaticity" of the law. See Ratner & Cole, *supra* note 287, at 764 n.217 (quoting Tribe, *supra* note 31, at 20 n.20).

<sup>310</sup> *Crockett*, 558 F.Supp. at 901.

<sup>311</sup> 568 F.Supp. 596 (D.D.C. 1983).

<sup>312</sup> *Id.* at 600 (citing *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982)).

<sup>313</sup> *Sanchez-Espinoza*, 568 F.Supp. at 599 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

<sup>314</sup> *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984).

<sup>315</sup> *Id.* at 1510.

<sup>316</sup> "Issues which are not at base sweeping challenges to the Executive's foreign policy typically are adjudicated by the courts because they do not involve judicial usurpation of the Executive's constitutional powers to manage foreign affairs." *Id.* at 1512.

this decision, Congress passed a law refusing funds for construction or operation of the Honduran base until the President certifies to Congress that the Government of Honduras "recognizes the need to compensate as required by international law the United States citizen who claims injury" from the taking of the land.<sup>317</sup>

### *Legislative Compulsion of Justiciability*

The record as regards recent disputes over the war power thus leaves unclear whether courts will be drawn into those kinds of issues and, if so, by whom, and in what circumstances. It may be that Congress, itself, preferably with presidential cooperation, can help to nudge the judiciary, not merely by clarifying the standards and establishing procedures for certifying that they have been violated in a particular instance, but also by legislating to compel justiciability in specified circumstances.<sup>318</sup> The "Hickenlooper Amendment" to the Foreign Assistance Act of 1961 may serve as a paradigm. That law specifically mandates courts to decide suits concerning foreign expropriation of U.S. assets "on the merits giving effect to the principles of international law."<sup>319</sup> Hickenlooper thus partially repeals the courts' recourse to the act of state doctrine, which holds that "courts of one country will not

<sup>317</sup> Pub. L. No. 98-473, §127. Thereupon, the judgment was vacated by the Supreme Court and remanded for reconsideration. *Weinberger v. Ramirez*, 53 U.S.L.W. 3824 (U.S. May 20, 1985).

<sup>318</sup> The obstacle to justiciability presented by the doctrine of "standing to sue" would present less serious barriers to congressional lawsuits against the Executive. "Standing" has been defined by the Supreme Court as "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to attain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972). Although courts during the Vietnam era on occasion dismissed suits by congressional plaintiffs for lack of standing (see, e.g., *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975); *Holtzman*, 484 F.2d at 1315), numerous other courts have explicitly found sufficient stake in congressional plaintiffs' claims to warrant standing. See, e.g., *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973) (congressman had standing to sue to enjoin alleged *ultra vires* Commander-in-Chief actions). Cf. *Kennedy v. Sampson*, 511 F.2d 430, 434-35 (D.C. Cir. 1974) (senator had standing to challenge alleged illegal presidential use of pocket veto).

In two recent suits involving congressional plaintiffs brought under the War Powers Resolution, the opinions reached a determination of nonjusticiability without finding any bar on standing grounds. See *Sanchez-Espinoza*, discussed in note 311 *supra* and accompanying text; *Crockett*, discussed in note 304 *supra* and accompanying text. Though in the court of appeals decision in *Crockett*, a concurring judge asserted that the congressional plaintiffs lacked standing, 720 F.2d at 1357 (Bork, J., concurring), the majority apparently felt no need to address this argument. Moreover, the Supreme Court's decision in *Goldwater v. Carter* suggests that the standing doctrine may have faded from judicial favor as a method of self-restraint in addressing separation-of-powers concerns when legislators sue the Executive. See McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 256 (1981). In any case, the Supreme Court has suggested that even if the political question doctrine cannot be legislatively overridden, *Sierra Club*, 405 U.S. at 732 n.3 (citing *Luther v. Borden*), standing to sue can be statutorily provided by Congress. In *Sierra Club*, the Court noted: "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the power of Congress to determine." *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 100 (1968)).

<sup>319</sup> 22 U.S.C. §2370(e)(2) (1982).

sit in judgment on the acts of the government of another done within its own territory."<sup>320</sup>

If legislation could limit the act of state doctrine, could it limit the political question doctrine? The Supreme Court, in *Banco Nacional de Cuba v. Sabbatino*,<sup>321</sup> thought that the act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers."<sup>322</sup> It justified the doctrine on grounds quite reminiscent of the political question concept: that the doctrine, while not constitutionally compelled, "does have 'constitutional' underpinnings";<sup>323</sup> that courts lack competency "to make and implement particular kinds of decisions in the area of international relations";<sup>324</sup> and that judicial deference avoids embarrassing the political branches in the conduct of foreign policy.<sup>325</sup>

The Hickenlooper Amendment was passed with the avowed intention of reversing the act of state doctrine following the *Sabbatino* case.<sup>326</sup> It thus constitutes a precedent for legislation compelling justiciability in specified foreign affairs statutes. Moreover, in *Banco Nacional de Cuba v. Farr*,<sup>327</sup> the district court recognized Congress's "considerable measure of power with respect to the courts," and concluded that "when Congress, dealing with subject matter within the powers delegated to it by the Constitution, speaks with respect to a voluntary judicial policy of self-limitation, the courts are bound to follow its directions unless compelled not to do so by the Constitution."<sup>328</sup> The circuit court, while affirming the constitutionality of the Hickenlooper Amendment's repeal of the judicial abstention requirement of the act of state doctrine,<sup>329</sup> left open "whether there might be a constitutional compulsion that the courts accept the direction of Congress even as to issues the Court has held to be nonjusticiable because they are 'political questions.'"<sup>330</sup>

The widespread judicial acceptance of the constitutionality of the Hickenlooper Amendment<sup>331</sup> suggests that courts might be disposed to listen to

<sup>320</sup> See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

<sup>321</sup> 376 U.S. 393 (1964).

<sup>322</sup> *Id.* at 423.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 431.

<sup>326</sup> See S. REP. NO. 1188, pt. I, 88th Cong., 2d Sess. 24 (1964). But one court has noted "that if the act of state doctrine is constitutionally compelled, as was both suggested and negated in *Sabbatino*, the Hickenlooper Amendment would be ineffective." *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, etc.*, 577 F.2d 1196, 1201 n.6 (5th Cir. 1978) (political question doctrine invoked to hold nonjusticiable conflicting oil concession claims of two sovereign nations).

<sup>327</sup> 243 F.Supp. 957 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956, *reh'g denied*, 390 U.S. 1037 (1968).

<sup>328</sup> 243 F.Supp. at 975-76.

<sup>329</sup> *Farr*, 383 F.2d at 180-81.

<sup>330</sup> *Id.* at 181 n.18.

<sup>331</sup> See, e.g., *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 327 (5th Cir. 1982); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 882 n.10 (2d Cir. 1981); *Banco Nacional de Cuba v. First Nat'l City Bank of N.Y.*, 431 F.2d 394, 397 n.7 (2d Cir. 1970). The cases have frequently held the Hickenlooper Amendment inapplicable on the grounds that it applies only to cases in which property expropriated abroad has found its way back into the United States. See, e.g., *Empresa Cubana Exportadora de Azucar v. Lamborn*

a congressional-presidential directive requiring them to adjudicate constitutionally based disputes between the legislative and executive branches, particularly when these arise in the context of judicially ascertainable facts applicable to specific standards spelled out in a law by which one branch has delegated limited discretion to the other.<sup>332</sup> Professor Covey T. Oliver has spoken of the need to "fix authority to resolve these contentions speedily, effectively, and normatively" and, while canvassing the possibility of constitutional amendment to empower the courts, concludes that "[i]nstitutional determination by the judiciary might suffice, assuming there are not too many doubts about a 'Book of Judges' approach to America's future governance."<sup>333</sup>

## XI. CONCLUSIONS

The Supreme Court, by holding the concurrent resolution procedure an unconstitutional form of lawmaking, has created serious problems for the conduct of foreign policy in a system of government by laws. Congress has been handed a major task of making repairs. Some statutes delegating discretion to the Executive may need to be reviewed because, the unconstitutional part not being severable, they will be invalid *in toto*. Others will need to be revised because, stripped of their legislative veto provisions, they now delegate powers too broadly and without specific standards, a state of affairs that may cause those laws to be unconstitutional, politically unreflective of Congress's will, or both. Still other laws that were intended to give the President additional authority based on a concurrent resolution procedure will now need to be revised if the President is to retain that power.

Congress has lost its trusted device for making the Executive consult and come into agreement, instance by instance, on the proper meaning to be ascribed to statutory words conveying legislative intent. This could lead to a system that too severely tethers the Presidency or invites a return to its "imperial" era. Neither extreme is desirable or necessary.

Rather, there are two promising lines of development. One is functional, the other legal. First, Congress—through oversight—and the Executive—through consultation—can do much to mitigate *Chadha's* dislocating effects

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& Co., 652 F.2d 231, 237 (2d Cir. 1981). Two circuit court cases, *Chase Manhattan Bank* and *First National City Bank*, have approvingly cited the *Farr* opinion's holding on the constitutionality of the Hickenlooper Amendment. Finally, a large number of courts have discussed the Hickenlooper Amendment without questioning its constitutional validity, though in these cases, the amendment was found inapplicable.

<sup>332</sup> On the other hand, we have noted above that the *Farr* court's willingness to be instructed by the Hickenlooper Amendment was rooted in the fact that it considered the act of state doctrine a prudential or discretionary rule of judicial self-restraint. Thus, if the political question doctrine is a constitutionally compelled doctrine of nonjusticiability, a legislative directive to ignore that doctrine might be found unconstitutional as violative of the separation of powers. A suggestion to this effect is found in *Sierra Club*, 405 U.S. at 732 n.3; see *supra* note 317.

<sup>333</sup> Oliver, *The United States and the World*, 426 AAPSS ANNALS 166, 193 (1976).

# FROM SEA TO SEABED: THE SINGLE MARITIME BOUNDARY IN THE GULF OF MAINE CASE

By L. H. Legault and Blair Hankey\*

## INTRODUCTION

Three decisions on maritime boundaries in a period of 9 months during 1984–1985 have doubled the body of case law on the delimitation of ocean space. The cases decided by international tribunals prior to 1984 applied only to the continental shelf. The waters overlying the shelf were either part of the high seas or, if subject to coastal state jurisdiction, were left undivided as between neighboring coastal states. However, two of the decisions rendered last year—the decision by a Chamber of the International Court of Justice in the *Gulf of Maine* case and the one by an ad hoc arbitral tribunal in the *Guinea / Guinea-Bissau* case—constituted the first judicial determinations of boundaries that divide jurisdiction over *both* the continental shelf and the water column beyond the territorial sea.<sup>1</sup> The decision by the International Court of Justice in the *Libya / Malta Continental Shelf* case represented the fourth in a line of cases delimiting the continental shelf alone.<sup>2</sup>

These cases were decided after the signature of the Final Act of the Third United Nations Conference on the Law of the Sea and the opening for signature of the new United Nations Convention on the Law of the Sea on December 10, 1982.<sup>3</sup> Although the new Convention has not yet come into force, many of its provisions relating to the maritime zones delimited in the recent cases are considered to express the new customary international law

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<sup>1</sup> Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12) (given by the Chamber constituted by the Order made by the International Court of Justice on Jan. 20, 1982) [hereinafter referred to as *Gulf of Maine* case]; and Tribunal arbitral pour la délimitation de la frontière maritime (Guinée/Guinée-Bissau), award of Feb. 14, 1985.

<sup>2</sup> Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ REP. 13 (Judgment of June 3) [hereinafter referred to as the *Libya/Malta* case].

<sup>3</sup> Opened for signature Dec. 10, 1982, reprinted in UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. Sales No. E.83.V.5).

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*Editorial Note:* This article continues a discussion of the *Gulf of Maine* case begun in the July 1985 issue in two articles: one by Davis R. Robinson, David A. Colson and Bruce Rashkow, and another by Jan Schneider. For detailed statement of the facts, issues and some tactics in this landmark case, the reader is referred to these earlier contributions to the scholarly literature.



of the sea that has emerged over the past decade. The question arises as to how these major developments in the law of the sea have influenced the preexisting law of delimitation of the continental shelf, as set out in the 1958 Convention on the Continental Shelf and as developed in the case law from 1969 to 1982.<sup>4</sup> In particular, what is the import of the Chamber's treatment of the request of Canada and the United States for a single boundary dividing both the continental shelf and the superjacent waters in the Gulf of Maine area for the substantive law of maritime delimitation?

This article seeks to demonstrate that the concept of a "single maritime boundary" had a critical influence on the decision of the Chamber in the *Gulf of Maine* case, although it led the Chamber not to transform but to clarify and adapt the law of maritime delimitation. The writers also maintain that this concept was not a whim or invention of the parties, but rather that it has logical and functional roots in the new regime of the exclusive economic zone, and that the Chamber was not simply bowing to the common will of Canada and the United States in holding at least that there is no rule of international law *against* such a boundary.<sup>5</sup>

## I. THE "FUNDAMENTAL NORM" OF MARITIME DELIMITATION

### *The Positions of the Parties*

With a few minor differences of wording, Canada and the United States agreed on a "fundamental norm" applicable to the determination of a single maritime boundary or, indeed, of any maritime boundary: namely, that the delimitation is to be effected in accordance with equitable principles, taking account of all the relevant circumstances, in order to reach an equitable result. From this common starting point, both parties attempted to elaborate specific equitable principles to be applied in the particular circumstances of the Gulf of Maine area but also having, in some instances, a more general validity.

Both Canada and the United States argued for the application of specific principles that would bring into play circumstances of a geographical as well as nongeographical nature.<sup>6</sup> While they were agreed that geography was the most important factor to be taken into account, they differed sharply as to what aspects of the geographical situation were most relevant. They were also disagreed as to what principles or criteria should be applied in order to

<sup>4</sup> North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3 (Judgment of Feb. 20) [hereinafter referred to as the North Sea cases]; Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 June 1977, 18 R. Int'l Arb. Awards 3, 18 ILM 397 (1979) [hereinafter referred to as the Anglo-French award]; and Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 ICJ REP. 18 (Judgment of Feb. 24) [hereinafter referred to as the Tunisia/Libya case].

<sup>5</sup> 1984 ICJ REP. at 267, para. 27.

<sup>6</sup> For a summary of the Canadian and United States arguments, see Schneider, *The Gulf of Maine Case: The Nature of an Equitable Result*, 79 AJIL 539, 548-58 (1985).

produce an equitable delimitation in the particular geographical circumstances of the area.

The Canadian claim was a modified equidistance line that would have allocated about 40 percent of the resource-rich Georges Bank to Canada. This line, by definition, was based primarily on the geographical principles of distance and proximity, modified by reference to criteria of scale and proportion. These criteria related to the alleged disproportionate effect of the relatively small-scale, but protruding, coastal features of Cape Cod and Nantucket Island on the course of the equidistance line, and therefore on the allocation of maritime space on Georges Bank.

The United States laid claim to the whole of Georges Bank and so rejected both the application of the equidistance method and the equitable character of the principles of distance and proximity that give the method its essential rationale. Rather, the United States gave priority to two geographical principles unrelated to proximity. The first was the principle that the boundary should allocate maritime space in proportion to the relative length of the relevant coastlines of the parties, thus giving primacy to the allegedly longer United States coast in the area. The second was that the boundary should avoid "cutting off" the seaward extension of the "primary" coast—the coast aligned with the general northeast-southwest direction of the East Coast of North America. The effect of this principle would be to allow an unlimited extension seaward of the maritime area considered to be appurtenant to the coast of Maine, while denying any significant seaward extension of the maritime area appurtenant to the "secondary" southwest coast of Nova Scotia. That coast, under the U.S. thesis, had the fatal defect of being aligned at a right angle to the general direction of the East Coast of the continent, which the United States thought should be controlling. Thus, the essential distinction between the Canadian and United States views of geographical equity was that, whereas Canada looked exclusively to the regional situation, the U.S. interpretation of regional geographical factors was ultimately a function of their macro-geographical or continental context. The effect of this difference in the geographical framework and scale considered relevant was to attribute an altogether different significance to the various coastal features in the area—Nova Scotia and Cape Cod/Nantucket—and, in the case of the United States, to deny any significance to factors of distance and proximity in the regional context.

Both parties also relied on nongeographical principles and factors to justify and confirm the equitable character of the line drawn initially by reference to geographical factors. The factors and principles on which they relied were once again divergent. Canada, for its part, relied principally on the alleged economic dependence of its coastal communities on the fishery resources of Georges Bank, on the conduct of the two Governments in relation to the issuance of licenses, permits and leases for oil and gas exploration and exploitation, and on the negotiation and signature of the 1979 Agreement on East Coast Fishery Resources (subsequently withdrawn from Senate consideration by President Reagan). The United States, on the other hand, relied principally on factors related to the marine environment, to the con-

servation and management of fishery resources, and on a wide range of governmental activities that were said to evidence the predominant interest of the United States throughout the Gulf of Maine area and, in particular, over the whole of Georges Bank.

Each of the parties elaborated a set of specific propositions or principles alleged to have a general application to problems of maritime delimitation.<sup>7</sup> Not surprisingly, these general principles served to demonstrate the equitable character and legal validity of the boundary lines advanced by the parties.

### *The Restatement of the Norm*

The Chamber rejected the contentions of the parties in favor of specific equitable principles and held that it was "unrewarding . . . to look to general

<sup>7</sup> The United States approach would have led to the adoption of a set of four specific equitable principles purportedly derived from the case law on continental shelf, territorial sea and land boundary delimitation and the new law of the sea developed at the Third United Nations Conference on the Law of the Sea and in recent state practice with regard to the exclusive economic zone. These principles were:

- (a) . . . that the delimitation respect the relationship between the relevant coasts of the Parties and the maritime areas lying in front of those coasts, including non-encroachment, proportionality, and, where appropriate, natural prolongation;
- (b) . . . that the delimitation facilitate conservation and management of the natural resources of the area;
- (c) . . . that the delimitation minimize the potential for disputes between the Parties; and
- (d) . . . that the delimitation take account of the relevant circumstances of the area.

United States Memorial [hereinafter cited as U.S. Mem.] at 231, Submissions, para. A.2.

Canada, for its part, set forth five propositions as fundamental to the application of equitable principles:

- (a) Equitable principles must be identified and applied on the basis of the applicable law.
- (b) The boundary should respect the basis of coastal State title.
- (c) The boundary should respect the basic purposes of the rights and jurisdiction in issue.
- (d) The boundary should take account of the legally relevant circumstances.
- (e) The result of the application of equitable principles must itself be equitable in light of all the relevant circumstances.

Canadian Counter-Memorial [hereinafter cited as Can. C.-Mem.] at 227, para. 545; Canadian Reply at 18, para. 427.

In the context of these legal considerations generally applicable to all maritime delimitations, Canada identified three principles that it claimed would lead to an equitable result in this case:

- (a) In the geographical and other circumstances of this case, the boundary should leave to each Party the areas of the sea that are closest to its coast, provided that due account is taken of the distorting effects of particular geographical features in the relevant area.
- (b) The boundary should allow for the maintenance of established patterns of fishing that are of vital importance to coastal communities within the relevant area.
- (c) The boundary should respect the indicia of what the Parties themselves have considered equitable as revealed by their conduct.

Can. C.-Mem. at 252-53, para. 608.

international law to provide a ready-made set of rules that can be used for solving any delimitation problems that arise."<sup>8</sup> A more useful course, in the Chamber's view, was to seek a more complete and more precise formulation of the fundamental norm, which the Chamber gave in the following terms:

(1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

(2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.<sup>9</sup>

In its restatement of the fundamental norm, the Chamber introduced a significant modification which, although not limited to the concept of a single maritime boundary, nevertheless prefigured the emphasis the Chamber was ultimately to give to the role of geography in the determination of such a boundary. That modification, of course, lay in singling out "*the geographic configuration of the area*," while referring only in general terms to "other relevant circumstances." In acknowledging the significance of the modification, however, it should also be recalled that geography has been recognized as an important circumstance in all the delimitation cases.

#### *Rejection of Article 6 of the Continental Shelf Convention*

Having concluded that general customary international law does not lay down rules specifically prescribing the application of any particular equitable criteria, the Chamber looked to the treaty law in force between the parties to determine whether that law required the application of certain criteria or certain practical methods.<sup>10</sup> While the 1958 Convention on the Continental Shelf was indeed binding upon Canada and the United States, the Chamber concluded that the combined equidistance-special circumstances rule in Article 6 of the Convention could have no mandatory force as regards a maritime boundary concerning a much wider subject matter than the continental shelf alone.<sup>11</sup> For reasons that will be addressed later in this article, this finding by the Chamber is undoubtedly one of the most important consequences flowing from the concept of the single maritime boundary.

The equidistance method enshrined in Article 6 of the Continental Shelf Convention is, of course, a geometric method of delimitation that depends entirely upon the coastal configuration of the area in question. From the restatement of the fundamental norm cited above, it can be seen that the

<sup>8</sup> 1984 ICJ REP. at 299, para. 111.

<sup>10</sup> *Id.* at 301-03, paras. 119-125.

<sup>9</sup> *Id.* at 299-300, para. 112.

<sup>11</sup> *Id.* at 303, para. 124.

Chamber, in rejecting the applicability of Article 6, was concerned not to reject its primary emphasis on geography.

### *Rejection of Proximity*

The singling out of geography in the Chamber's restatement of the fundamental norm may also have been influenced by the Chamber's rejection of proximity both as a basis of coastal state title to the zones to be delimited and as a principle of delimitation.

In the *Gulf of Maine* proceedings, Canada argued that the boundary should respect the basis of coastal state title<sup>12</sup> or, in other words, that the basis upon which international law attributes title to maritime zones must be relevant to the delimitation process. The Court in 1969 found natural prolongation to be the basis of coastal state title over the continental shelf, and for this reason made natural prolongation the point of departure for the legal principles of continental shelf delimitation.<sup>13</sup> The "trend toward the distance principle" as the basis of coastal state jurisdiction over the continental shelf and exclusive economic zone was explicitly recognized by the Court in its Judgment in the *Tunisia/Libya* case. In particular, the Court noted that insofar as the 1982 Convention on the Law of the Sea provides in certain circumstances that "distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State, it departs from the principle that natural prolongation is the sole basis of the title."<sup>14</sup> Canada argued that this evolution in the basis of title to the maritime zones being delimited required a reconsideration of the Court's 1969 rejection of proximity in favor of natural prolongation as an underlying principle of delimitation.<sup>15</sup>

The Chamber acknowledged that the basis of title to the zones being delimited had evolved since the *North Sea* cases, so that it is the physical fact

<sup>12</sup> Can. C.-Mem. at 230-31, paras. 555-556:

There is a close correlation between the basis of coastal State title and the law applicable to the delimitation of maritime zones. It was precisely for this reason that the Court in 1969 made natural prolongation the point of departure for the principle of delimitation it adopted. More generally, the question as to which State has the stronger title is central to the evaluation of competing claims between opposite or adjacent States, and this question can be addressed only in terms of the basis upon which the law attributes to coastal States title to maritime areas.

Developments in the law of the sea have made distance from the coast the decisive factor in the definition of coastal State title to offshore zones. The most fundamental characteristic of coastal State title to an exclusive economic zone is that it is the same for all coastal States. It is a spatial concept that operates independently of any physical criteria other than simple proximity to the coast. Not only does the 200-mile distance criterion constitute the sole basis of coastal State title to the exclusive economic zone or 200-mile fishing zone, but it has now been accepted also as a sufficient basis of continental shelf jurisdiction within that distance from the coast. It has become the central factor in giving precise content to the principle of appurtenance and to the maxim that the land dominates the sea.

<sup>13</sup> *North Sea cases*, 1969 ICJ REP. at 31, para. 43.

<sup>14</sup> 1982 ICJ REP. at 48, para. 48.

<sup>15</sup> Can. C.-Mem. at 230-33, paras. 555-563.

of geographical adjacency, rather than natural prolongation, that best expresses "the link between a State's sovereignty and its sovereign rights to adjacent submerged land."<sup>16</sup> It maintained, however, that

"legal title" to certain maritime or submarine areas is always and exclusively the effect of a legal operation. The same is true of the boundary of the extent of the title. That boundary results from a rule of law, and not from any intrinsic merit in the purely physical fact. In the Chamber's opinion it is therefore correct to say that international law confers on the coastal State a legal title to an *adjacent* continental shelf or to a maritime zone *adjacent* to its coasts; it would not be correct to say that international law recognizes the title *conferred on the State by the adjacency* of that shelf or that zone, as if the mere natural fact of adjacency produced legal consequences.<sup>17</sup>

The Chamber accordingly set aside the Canadian arguments as amounting to "just one more, still unconvincing, endeavour to instil the idea that 'equi-distance'—rather than 'distance'—is a concept endorsed by customary international law."<sup>18</sup> The justification for the primary role of geography would thus have to come from elsewhere.

#### *Equitable Criteria and Relevant Circumstances*

Apart from the notion that equitable principles are a means of achieving an equitable result, and that "[t]he equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result,"<sup>19</sup> the judicial and arbitral decisions that preceded the *Gulf of Maine* case shed little light on the legal character of equitable principles and relevant circumstances, or the relation between these two concepts. The *North Sea* cases, while they emphasized the relevance to delimitation of the basis of title, also appeared to suggest that equitable principles are to be derived from the particular factual circumstances of each case.<sup>20</sup> This approach was carried further in the *Tunisia / Libya* case.<sup>21</sup>

In the *Gulf of Maine* case, the Chamber observed that "[t]here has been no systematic definition of the equitable criteria that may be taken into consideration . . . and this would in any event be difficult *a priori*, because of their highly variable adaptability to different concrete situations."<sup>22</sup> The Chamber clearly stated what was already implicit in the earlier jurisprudence: namely, that equitable criteria are derived from or imposed by the particular factual situation.<sup>23</sup> These criteria are then applied to the same facts from which they were derived in order to produce an equitable result.<sup>24</sup>

<sup>16</sup> 1984 ICJ REP. at 296, para. 103.

<sup>17</sup> *Id.* (emphasis in original).

<sup>18</sup> *Id.* at 297, para. 106.

<sup>19</sup> *Tunisia / Libya* case, 1982 ICJ REP. at 59–60, paras. 70–71. *See also* *North Sea* cases, 1969 ICJ REP. at 49, para. 90; and at 50, para. 92.

<sup>20</sup> 1969 ICJ REP. at 50–51, paras. 93–94.

<sup>21</sup> 1982 ICJ REP. at 60–61, para. 72.

<sup>22</sup> 1984 ICJ REP. at 312, para. 157.

<sup>23</sup> *Id.* at 278, para. 59; at 312–13, paras. 156–158; at 326, para. 191; and at 328, paras. 197–198.

<sup>24</sup> *Id.* at 326, para. 191.

In remaining faithful to this fact-intensive approach, the Chamber appears at first blush to have reserved to itself a virtually unfettered discretion in selecting the criteria that would lead to an equitable result in the light of the particular facts of the case. For the Chamber listed the criteria and practical methods that might "theoretically" be applied "without its approach being influenced by predetermined preferences."<sup>25</sup> The criteria were largely based on precedent, being those "mentioned in the arguments advanced by the parties in cases concerning the determination of continental shelf boundaries, and in the judicial or arbitral decisions in those cases."<sup>26</sup> The Chamber's task was to "select, from this range of possibilities, the criteria that it regards as the most equitable for the task to be performed in the present case."<sup>27</sup>

In fact, however, the Chamber proceeded to restrict rather than enlarge the range of subject matter from which relevant circumstances and equitable criteria may be identified, as the following section of this article will demonstrate. Indeed, an apparent preference for geographical circumstances is to be found even in the Chamber's listing of the equitable criteria that "may theoretically be applied." As already mentioned, these criteria were found in the arguments advanced and the decisions given in continental shelf boundary cases. In this listing, the Chamber included only criteria derived from geographical circumstances,<sup>28</sup> although criteria derived from nongeographical circumstances were mentioned in the decisions in all the earlier cases and were advanced by both parties in the *Gulf of Maine* case.<sup>29</sup>

There is here an element of apparent paradox. The Chamber proceeds from a broad statement to a narrow application of equitable criteria. It might be logical, however, to assume that the concept of the single maritime boundary would have led to a broad approach in both the definition and the application of these criteria. For a multipurpose zone of maritime jurisdiction inevitably brings into play a much broader range of interests, activities and functions, relating to both the seabed and its overlying waters. This was, at any rate, the view put forward by Canada in its pleadings.<sup>30</sup> At the same time, Canada recognized that in a single maritime boundary delimitation, "the relative importance of factors that are specific to any one form of jurisdiction is diminished, and to some extent these factors may tend to

<sup>25</sup> *Id.* at 312, para. 156.

<sup>26</sup> *Id.*, para. 157.

<sup>27</sup> *Id.*, para. 156.

<sup>28</sup> *Id.*, para. 157.

<sup>29</sup> In the *Anglo-French* arbitration, the British urged the tribunal to take account of the size, economic importance and political status of the Channel Islands. The tribunal held that these considerations "may properly be taken into account in balancing the equities in the region." *Anglo-French award*, *supra* note 4, para. 187. In the *Tunisia/Libya* case, both parties raised arguments based on economic factors. See 1982 ICJ REP. at 77, para. 106. While rejecting the relevance of economic factors of the kind raised by the parties, the Court left open the possibility of admitting the relevance of economic factors related to the exploration of resources in the area to be delimited: "As to the presence of oil wells in the area to be delimited, it may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result." *Id.* at 77-78, para. 107.

<sup>30</sup> Can. C.-Mem. at 195-96, para. 469.

cancel each other out.”<sup>31</sup> Thus, Canada concluded, “the heightened importance of the factors that are common to each of the relevant forms of jurisdiction tends to enhance the importance of proximity.”<sup>32</sup> As will be seen, this is precisely one of the lines of reasoning adopted by the Chamber, with the exception that the Chamber substituted *geography* for proximity as the common factor whose importance was enhanced owing to the special aspect of the Gulf of Maine delimitation: namely, that it divided both seabed and water column jurisdiction by a single boundary.

The other line of reasoning followed by the Chamber in eliminating or subordinating nongeographical circumstances and criteria was, in effect, complementary to the reasoning based on the concept of the single maritime boundary; but it relied on a mixture of particular factual and legal considerations. This line of reasoning will be examined first.

## II. SELECTION OF THE RELEVANT CIRCUMSTANCES AND EQUITABLE CRITERIA

### *Exclusion of Nongeographical Circumstances*

The Chamber invoked a variety of legal and factual grounds to exclude or subordinate all of the nongeographical factors advanced by the parties. This approach was followed in dealing with arguments relating to the natural environment, the “human environment” and the conduct of the parties. The grounds varied with the particular factor under consideration.

*The Natural Environment.* With regard to geology, the Chamber observed that “both Parties recognize that the geological structure of the strata underlying the whole of the continental shelf of North America, including the Gulf of Maine area, is essentially continuous. They are in fact in agreement that geological factors are not significant in the present case.”<sup>33</sup> In keeping with the line of reasoning already established in the *Anglo-French* arbitration and the *Tunisia / Libya* case, the Chamber made its exclusion of geological circumstances case-specific and reserved the possibility of their consideration in other cases.<sup>34</sup>

The Chamber’s reasoning with respect to ecological factors is more complex. The United States argued that there are three distinct ecological provinces in the Gulf of Maine area, and that the Northeast Channel, separating the Georges Bank and Scotian Shelf provinces, formed a “natural boundary” with which the boundary to be fixed by the Chamber should be compatible. The Chamber rejected this contention on four grounds. First, it doubted “the possibility of discerning any genuine, sure and stable ‘natural boundaries’ in so fluctuating an environment as the waters of the ocean, their flora and fauna.”<sup>35</sup> Second, it rejected the possibility of basing a natural boundary “serving a double purpose,” that is, delimiting both the seabed and the water column, on “a geomorphological accident which influences superad-

<sup>31</sup> *Id.*

<sup>33</sup> 1984 ICJ REP. at 273, para. 44.

<sup>35</sup> *Id.* at 277, para. 54.

<sup>32</sup> *Id.*

<sup>34</sup> *Id.* at 275, para. 47.



jacent [*sic*] waters but which is clearly inadequate to be seen as a natural boundary in respect of the sea-bed itself."<sup>36</sup> Third, the Chamber concluded on the evidence presented that "the great mass of water belonging to the delimitation area . . . essentially possesses the same character of unity and uniformity already apparent from an examination of the sea-bed."<sup>37</sup> Finally, the Chamber emphasized that delimitation is "a legal-political operation, and . . . it is not the case that where a natural boundary is discernible, the political delimitation necessarily has to follow the same line."<sup>38</sup>

It should be noted that whereas the first and fourth grounds for rejecting the natural boundary thesis would appear to be applicable to any delimitation involving the water column, the second ground is directed specifically to a single boundary delimiting both the seabed and the superjacent waters, and the third ground is limited to the particular facts of the case.

*The Human Environment.* Having disposed of geology and ecology, the Chamber turned to circumstances related to the human environment, and more particularly to socioeconomic factors. The Chamber treated together the various arguments of the parties relating to the history of the fishery in the Gulf of Maine area, the economic dependence of coastal communities on the fishery resources of the disputed area, the conservation problems that might arise from a line that did not ensure a system of single-state management for the fish stocks of Georges Bank, and the activities of the parties in such fields as offshore oil and gas exploration, scientific research, defense and navigation.

The Chamber observed that these "aspects . . . may require an examination of valid considerations of a political and economic character."<sup>39</sup> But it considered that to take such factors into account in drawing a boundary would amount to making a decision *ex aequo et bono*, rather than on the basis of law, and would therefore be contrary to the Statute of the Court and to the Special Agreement.<sup>40</sup> The Chamber was convinced that international law required it to apply equitable criteria "which are not spelled out," but which are essentially to be determined on the basis of the "geographical features of the area."<sup>41</sup> It was only when the Chamber had, "on the basis of these criteria, envisaged the drawing of a delimitation line, that it may and should—still in conformity with a rule of law—bring in other criteria which may also be taken into account in order to be sure of reaching an equitable result."<sup>42</sup>

In rejecting the arguments of the United States concerning the relevance of its long and continuous presence in the area in terms of fishing, fisheries conservation and management, aids to navigation, research, defense, and so on, the Chamber recalled that until very recently, the maritime areas in question were part of the high seas and as such were open to the fishermen of all nations. The presence of the nationals of these third states evidently

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, para. 55. See also *id.* at 276–77, paras. 53 and 56.

<sup>38</sup> *Id.* at 277, para. 56.

<sup>40</sup> *Id.*

<sup>42</sup> *Id.* at 278, para. 59.

<sup>39</sup> *Id.* at 278, para. 59.

<sup>41</sup> *Id.* See also *id.* at 342, para. 237.

afforded them no rights, since with the establishment of 200-mile exclusive fisheries zones, "[t]hird States and their nationals found themselves deprived of any right of access to the sea areas within those zones."<sup>43</sup> Likewise, "to the extent that [these sea areas] had become part of the . . . zone of the neighbouring State, no reliance could any longer be placed" by the parties on their earlier fishing and other maritime activity.<sup>44</sup>

The Chamber held that, "to a certain extent," the same reasoning applied with respect to the relevance of the socioeconomic dependence of coastal communities on the fishery resources of the disputed area. For "there is no reason to consider *de jure* that the delimitation which the Chamber has now to carry out . . . must result in each Party's enjoying an access to the regional fishing resources which will be equal to the access it previously enjoyed *de facto*."<sup>45</sup>

Having concluded that the respective scale of activities related to the human presence in the area could not be taken into account "as a relevant circumstance or, if the term is preferred, as an equitable criterion . . . in determining the delimitation line," the Chamber considered it "legitimate" to consider whether the overall result might "unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned."<sup>46</sup> "Fortunately," the Chamber concluded, "there is no reason to fear that any such danger will arise in the present case. . . ."<sup>47</sup> The Chamber based this conclusion on the view that the boundary it was establishing would leave to each party its most important traditional fishing grounds on Georges Bank, at least for scallops and lobsters.<sup>48</sup>

The Chamber thus established both a hierarchy of relevant circumstances and a system for their successive application in the delimitation process. The line is first to be determined on the basis of criteria and methods derived from the geographical circumstances, and then the "intrinsic equity" of the "overall result" is to be tested against socioeconomic factors and criteria. But a high burden of proof—"radically inequitable," "catastrophic repercussions"—is placed on the party seeking to adjust or displace the line initially determined on the basis of geographical factors and criteria.<sup>49</sup> Thus, socioeconomic factors, although not excluded from the delimitation process, are subordinated to geographical factors both in terms of the weight they are accorded and the stage at which they are considered. In effect, these factors

<sup>43</sup> *Id.* at 341–42, para. 235. *See also id.* at 278, para. 58.

<sup>44</sup> *Id.* at 342, para. 235.

<sup>45</sup> *Id.*, para. 236.

<sup>46</sup> *Id.*, para. 237.

<sup>47</sup> *Id.* at 343, para. 238.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 342, para. 237. The very high level of the presumption against the relevance of economic data is indicated by the Chamber's conclusion that "nothing less than a decision which would have assigned the whole of Georges Bank to one of the Parties might possibly have entailed serious economic repercussions for the other." *Id.* at 343, para. 238. The Chamber thereby implies that only if geographical factors and criteria had produced a line allocating the whole of the object of the dispute to one of the parties would it have been permitted in law, to adjust the boundary to take account of the economic equities.

serve as a kind of final test of equity. Such a test, it seems, would be more relevant to a boundary involving both continental shelf and fisheries jurisdiction, as fishery resources are more likely to have been known and exploited and to have created a pattern of economic dependence.

*The Conduct of the Parties.* The conduct of the parties with respect to off-shore oil and gas exploration is not considered by the Chamber together with the other relevant circumstances of the case, but rather is taken up in section V of the Judgment, which is devoted to the consideration of "special international law . . . as at present in force between the Parties."<sup>50</sup> After dealing with Article 6 of the 1958 Convention on the Continental Shelf, the Chamber goes on to deal with "a related question," namely, "whether, as between the Parties, any other factors have intervened which might, independently of any formal act creating rules or instituting relations under special international law, nevertheless give rise to an obligation" to apply specific delimitation methods or lines.<sup>51</sup>

As was noted by the Chamber, Canada argued that the conduct of the United States with respect to oil and gas exploration and leasing should be taken into account in three ways:

[F]irst, as evidence of genuine acquiescence in the idea of a median line as the boundary between the respective maritime jurisdictions, and of a resultant estoppel against the United States; secondly, as an indication, at least, of the existence of a *modus vivendi* or of a *de facto* boundary, which the two States have allowed to come into being; and thirdly and lastly, as mere indicia of the type of delimitation that the Parties themselves would have considered equitable.<sup>52</sup>

The Chamber rejected the Canadian arguments with respect to acquiescence and estoppel on the basis of a thorough consideration of the facts and the relevant case law.<sup>53</sup> As to the claim of a "*modus vivendi*" or "*de facto*" maritime boundary, the Chamber noted that Canada had relied heavily on the reasoning and pronouncements of the Court in the *Tunisia / Libya* case.<sup>54</sup> The Chamber found that,

even supposing that there was a *de facto* demarcation between the areas for which each of the Parties issued permits . . . , this cannot be recognized as a situation comparable to that on which the Court based its conclusions in the *Tunisia / Libya* case. . . . [For although] the Court relied upon the fact of the division between the petroleum concessions issued by the two States concerned . . . it took special account of the conduct of the Powers formerly responsible for the external affairs of Tunisia—France—and of Tripolitania—Italy—, which it found amounted to a *modus vivendi*. . . .<sup>55</sup>

Finally, the Chamber also dismissed Canada's third assertion, that the lines used by the parties in granting oil and gas permits and leases should be taken into account as indicia of the type of delimitation that Canada and

<sup>50</sup> *Id.* at 230, para. 114.

<sup>52</sup> *Id.* at 304, para. 128.

<sup>54</sup> *Id.* at 310, para. 149.

<sup>51</sup> *Id.* at 303, para. 126.

<sup>53</sup> *Id.* at 304-10, paras. 129-148.

<sup>55</sup> *Id.*, para. 150.

the United States themselves would have considered equitable, on the ground that the "facts cannot support this idea any more than the others."<sup>56</sup>

*The Single Maritime Boundary: The Requirement for "Neutral" Criteria*

As already mentioned, the other ground on which the Chamber rejected the relevance of nongeographical circumstances relates to the nature of the delimitation that it was to effect: the "delimitation of two distinct elements by means of a single line."<sup>57</sup> The language used by the Chamber suggests that it regarded the need to delimit both the seabed and the superjacent waters by means of a single line as a highly relevant fact or special circumstance, rather than as a legal consideration; "the very fact that the delimitation has a twofold object constitutes a special aspect of the case which must be taken into consideration even before proceeding to examine the possible influence of other *circumstances* on the choice of applicable criteria."<sup>58</sup>

The Chamber's preoccupation with the new and special problems raised by the delimitation of a single maritime boundary was reflected in a question put to both parties by the President, Judge Ago, between the first and second rounds of the oral proceedings:

In the event that one particular method, or set of methods, should appear appropriate for the delimitation of the continental shelf, and another for that of the exclusive fishery zones, what do the Parties consider to be the legal grounds that might be invoked for preferring one or the other in seeking to determine a single line?<sup>59</sup>

The parties gave rather different answers to this question.<sup>60</sup> The Chamber came to yet another view.

<sup>56</sup> *Id.* at 311, para. 152.

<sup>57</sup> *Id.* at 326, para. 192.

<sup>58</sup> *Id.*, para. 193 (emphasis added). See also Dissenting Opinion of Judge Gros, *id.* at 363, para. 6.

<sup>59</sup> ICJ Doc C 1/CR 84/17, at 62 (Apr. 19, 1984) [hereinafter these documents of the oral proceedings will be referred to simply by the Court's identification; as the year is included in that identification, it will not be repeated]. See also 1984 ICJ REP. at 314-15, para. 161.

<sup>60</sup> For Canada's reply, see statement by L. H. Legault, Agent and Counsel for Canada, C 1/CR 84/22, at 34-39 (May 5). For the U.S. reply, see statement by John R. Stevenson, Counsel for the United States, C 1/CR 84/24, at 19-26 (May 9). For the Court's summary of the parties' replies, see 1984 ICJ REP. at 314-15, para. 161:

In its reply, the United States noted that in such circumstances there appeared to be no legal grounds to be invoked *a priori* for preferring one or another method, and that the applicable principles and relevant circumstances should be considered as an integrated whole. In the view of the United States, circumstances relevant to the functional effectiveness of a boundary relating to both the water column and the sea-bed should be given greater weight than circumstances relating to only one of them. Canada expressed the opinion that preference as to method should depend on the degree of relevance to be attached to a given factor in relation to the delimitation of all or any part of the boundary. It explained that such degree might differ in each of the two areas under consideration: the Gulf of Maine itself, as far seaward as the Cape Sable-Nantucket closing line, and the outer area that includes Georges Bank. It concluded that preference as to method should be dictated by the relevant circumstances of each of the two areas.

The dual aspect of the delimitation, the Chamber concluded, "rule[d] out the application of any criterion found to be typically and exclusively bound up with the particular characteristics of one alone of the two natural realities that have to be delimited in conjunction."<sup>61</sup> Thus, for example, it ruled out the application of criteria derived from ecological or geological circumstances, since such criteria would relate respectively to the water column or the seabed alone.<sup>62</sup> For, in the Chamber's view:

a delimitation which has to apply at one and the same time to the continental shelf and to the superjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them.<sup>63</sup>

The Chamber considered itself bound to apply criteria derived "especially" from geography, by which it meant "mainly" the geography of coasts,<sup>64</sup> because such criteria, given their "more neutral character, are best suited for use in a multi-purpose delimitation."<sup>65</sup>

The Chamber's case-specific approach is perhaps best illustrated by its apparent treatment of the single maritime boundary, as opposed to a continental shelf boundary alone, as a "special aspect" or factual circumstance from which flowed certain consequences for the selection of equitable criteria, rather than as a change in the legal regime of the zones being delimited, calling for consequential changes in the law of maritime delimitation. But if the approach is case-specific on its face, when the Chamber's reasoning is subjected to closer scrutiny, it would appear to have certain implications of a general character for the selection of relevant circumstances and equitable criteria. These implications are examined below.

### III. THE PRIMACY OF GEOGRAPHY

#### *The Delimitation of the Continental Shelf*

Even before turning to a consideration of the consequences of delimitation by means of a single boundary, the Chamber set standards for the relevance of nongeographical circumstances that would seem to relegate them to a secondary role or even exclude them from consideration in most delimitations. Since there is nothing in this part of the Judgment that links the Chamber's reasoning to the single boundary aspect of the case, it may be assumed that these conclusions are equally relevant to the delimitation of the continental shelf alone, or, in the case of ecological or socioeconomic factors, to the delimitation of jurisdiction bearing on the superjacent water column alone.

One caveat, however, should be registered here. The Chamber, of course, considered only those kinds of nongeographical circumstances advanced by the parties. Other such circumstances, not considered by the Chamber, may

<sup>61</sup> 1984 ICJ REP. at 326, para. 193.

<sup>63</sup> *Id.* at 327, para. 194.

<sup>65</sup> *Id.*, para. 194.

<sup>62</sup> *Id.*

<sup>64</sup> *Id.*, para. 195.

shelf and the overlying waters. But where the delimitation is of the latter type, the Chamber's conclusions as to the kind of circumstances that can be admitted as relevant are more clearly of a universal character.

The Chamber was requested in the Special Agreement to determine "the course of the single maritime boundary that divides the continental shelf and fisheries zones" of the parties.<sup>76</sup> And, as the Chamber noted, the effect of Article III of the Special Agreement<sup>77</sup> is that the boundary drawn by the Chamber is applicable to all aspects of the jurisdiction of the coastal state, "not only jurisdiction as defined by international law in its present state, but also as it will be defined in future."<sup>78</sup> The formulation "single" boundary dividing "the continental shelf and fisheries zones" was used in the Special Agreement because neither party had yet established an exclusive economic zone as such. Had the parties had such zones in place before the Special Agreement came into force, it is probable that the question put to the Chamber would have been formulated in terms of a boundary dividing their exclusive economic zones.

On March 10, 1983—that is, after the commencement of the proceedings—the United States proclaimed an exclusive economic zone.<sup>79</sup> This development does not appear to have influenced the reasoning or decision of the Chamber. Canada, for its part, pointed out that "the rights and jurisdiction Canada exercises within its 200-mile fishing zone are substantially similar to the rights and jurisdiction associated with the concept of the exclusive economic zone; they include sovereign rights in respect of seabed resources and jurisdiction in respect of environmental protection."<sup>80</sup>

Neither the Chamber nor the parties seem to have considered that there is a material difference between the law applicable to a single boundary dividing the continental shelf and fisheries zones and the law applicable to a delimitation of exclusive economic zones that include in a single regime the seabed and superjacent waters within the 200-mile limit. When the Chamber speaks of "two distinct elements,"<sup>81</sup> "two natural realities"<sup>82</sup> or "two objects,"<sup>83</sup> it appears to be referring to the two natural components of the exclusive economic zone rather than to two legal regimes.<sup>84</sup> Indeed,

<sup>76</sup> Article II(1), Special Agreement Between the Government of Canada and the Government of the United States of America to Submit to a Chamber of the International Court of Justice the Delimitation of the Maritime Boundary in the Gulf of Maine Area, signed Mar. 29, 1979, entered into force as amended, Nov. 20, 1981, annex to TIAS No. 10204, reprinted in 20 ILM 1378 (1981), and Canadian Memorial [hereinafter cited as Can. Mem.] at 3.

<sup>77</sup> Article III(1) of the Special Agreement, *id.*, reads: "South and west of the maritime boundary to be determined in accordance with this Special Agreement Canada shall not, and north and east of said maritime boundary the United States shall not, claim or exercise sovereign rights or jurisdiction for any purpose over the waters or seabed and subsoil."

<sup>78</sup> 1984 ICJ REP. at 267, para. 26.

<sup>79</sup> Exclusive Economic Zone of the United States of America, Proc. No. 5030, Mar. 10, 1983, 48 Fed. Reg. 10,605 (1983).

<sup>80</sup> Can. C.-Mem. at 2, para. 7. See also Can. Mem. at 18 n.7.

<sup>81</sup> 1984 ICJ REP. at 326, para. 192.

<sup>82</sup> *Id.*, para. 193.

<sup>83</sup> *Id.* at 327, para. 194.

<sup>84</sup> One exception should be noted. The Chamber makes one reference to "a single boundary for two different jurisdictions." *Id.* at 267, para. 27.

the Chamber considered its approach to be generally applicable to the delimitation of exclusive economic zones:

[I]t can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation.<sup>85</sup>

The exclusive economic zone and the continental shelf doctrine, to the extent that it is retained in the 1982 Convention, both represent a compromise between spatial (or territorial) and functionalist conceptions of maritime jurisdiction.<sup>86</sup> The jurisdiction exercised by coastal states in respect of the exclusive economic zone and the continental shelf is functionally limited in terms of the subject matter to which it applies, but the essential basis of that jurisdiction is geographical and its range is determined exclusively in spatial terms. For while the state's jurisdiction beyond the territorial sea is especially directed to natural resources and related economic activity, the resources are not the legal cause of the zone and a state is entitled to exercise exclusive jurisdiction without regard to whether resources are known to exist, or whether the population of the coastal state has any established dependence upon such resources or any practical means of utilizing them. And while certain duties are imposed on coastal states with respect to the management and conservation of the living resources in their exclusive economic zones, their title or jurisdiction is in no way contingent upon the proper exercise of these duties.<sup>87</sup>

The legal basis for the jurisdiction of the coastal state in respect of the exclusive economic zone is linked to geographical adjacency<sup>88</sup> and its seaward limit is determined exclusively on the basis of the geographical criterion of distance from the coast.<sup>89</sup> While the situation with regard to the continental shelf is more complex, it is safe to say that geographical adjacency measured by the distance criterion is a sufficient basis of title within 200 miles of the coast.<sup>90</sup> Thus, neither the coastal state's right to exercise jurisdiction within the 200-mile zone nor the seaward limits of that title or jurisdiction are a function of such factors as the physical structure of the continental shelf; the oceanographic, biological or ecological characteristics of the water mass; prior "dominance" or historic claims; the presence, exploitation, management or conservation of natural resources; or the activities of the coastal or

<sup>85</sup> *Id.* at 327, para. 194.

<sup>86</sup> D. JOHNSTON & E. GOLD, *THE ECONOMIC ZONE IN THE LAW OF THE SEA: SURVEY, ANALYSIS AND APPRAISAL OF CURRENT TRENDS* 1-8 (Law of the Sea Institute Occasional Paper No. 17, 1973); *Gulf of Maine case*, Dissenting Opinion of Judge Oda, 1984 ICJ REP. 211-34, paras. 89-140; Wodie, *Les Intérêts économiques et le droit de la mer*, 80 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [RGDIP] 738, 744-61 (1976).

<sup>87</sup> UN Convention on the Law of the Sea, *supra* note 3, Arts. 56, 61-67.

<sup>88</sup> 1984 ICJ REP. at 269, para. 103.

<sup>89</sup> UN Convention on the Law of the Sea, *supra* note 3, Art. 57.

<sup>90</sup> *Tunisia/Libya case*, 1982 ICJ REP. at 48, paras. 47-48.

distant states and their nationals in the area. Since these factors are not taken into account in determining the title of the coastal state or the seaward limit of the area within which it may exercise jurisdiction, there is no logical reason why they should be taken into account in determining the lateral limits of that jurisdiction. The approach of the Chamber in restricting the range of applicable criteria and relevant factors in the delimitation of a single maritime boundary therefore appears to be soundly based on the legal nature of the zones being delimited,<sup>91</sup> notwithstanding that the Chamber minimized the significance of the link between geographical adjacency measured in terms of distance from the coast and the legal basis of title.

Judge Gros, however, considered that the validity of the Chamber's elimination of the nongeographical factors and criteria—and, indeed, the validity of the single maritime boundary itself—depends upon whether the legal regime of the continental shelf within 200 miles of the coast has been merged into the regime of the exclusive economic zone:

The Chamber could not adopt a position involving the mutual neutralization of the relevant criteria of the continental shelf and of the water without examining them, unless it first settled this problem of the recognition in customary law of the merging of all jurisdictions over the maritime spaces in the 200-mile zone. . . . The question is whether it may, at will, delimit a continental shelf and the superjacent waters taking them separately, in turn, or as fused with one another. . . .<sup>92</sup>

While Judge Gros's answer to the question he poses is not explicit—he says that “[i]t is up to those who support the current legal vacuum to demonstrate . . . that a fusion has taken place . . . and that a single boundary is called for”—he clearly doubts that such a result has been produced under either the 1982 Convention or customary international law.<sup>93</sup> Thus, he argues that the Chamber failed to “balance up the equities of the two elements, the continental shelf and the water column,”<sup>94</sup> and that “[b]y not carrying out an examination of the proper factors for determining the course of a boundary equitable for both elements, . . . the Chamber has failed to assess the equities in its treatment of the facts.”<sup>95</sup>

<sup>91</sup> Judge Gros appears to recognize that the Chamber's approach is consistent with the new law of the sea when he states:

Having changed the law on such areas [beyond the territorial sea], States cannot retain those features which once gave point to the work done in studying the special fishery interest and economic dependence of certain sectors of a population. The entire bases of reasoning have altered; the coastal State wanted exclusive jurisdiction over the sea-bed and subsoil, then over the water column, and it has obtained what it wanted; *but the resources are not the legal cause of the exclusive zone*, they have been removed outside the problem: the existence of mineral or living resources is not taken into account. A continental shelf without resources and an almost empty sea offer no obstacle to the appropriation of the continental shelf and of a fishery zone. The notion of economic dependence can no longer be invoked as a determining factor. . . .

1984 ICJ REP. at 371, para. 17 (emphasis added).

<sup>92</sup> *Id.* at 373, para. 19.

<sup>93</sup> *Id.* at 375, para. 22. See also *id.* at 374, para. 21.

<sup>94</sup> *Id.* at 369, para. 14.

<sup>95</sup> *Id.*, para. 15.



As seen above, the Chamber's exclusion or subordination of nongeographical factors in a single delimitation of the seabed and superjacent waters within 200 miles did not depend on any "fusion" of the two regimes. Geological, ecological and socioeconomic factors, as well as the conduct of the parties, were set aside for legal or factual reasons not related to the single-boundary aspect of the case—let alone any idea of fusion of regimes. Moreover, geography is clearly a relevant factor of central importance to both the seabed and the superjacent waters, whether taken together or separately, not necessarily because it is a "neutral" factor, perhaps, but because it goes to the basis of title or jurisdiction for both "elements."

Judge Gros's question, however, really goes to the issue whether the will of the parties is a sufficient warrant for a single maritime boundary if the two regimes have not been fused. In other words, would the continued existence of the continental shelf regime within the economic zone regime legally *require* two distinct boundaries, which might sometimes coincide in fact (owing to a coincidence of shelf and water column equities) but never in law—or at least never to the extent of permitting a single *simultaneous* delimitation of shelf and water column?

As noted earlier, the Chamber contented itself with saying that there was no rule of international law against a single maritime boundary, while not pronouncing itself on the question of fusion of regimes. The present writers believe that the Chamber's finding is unassailable. Nevertheless, the question whether a fusion or integration of some kind has taken place has important implications for the law of maritime delimitation.

#### IV. THE CONTINENTAL SHELF AND THE EXCLUSIVE ECONOMIC ZONE

##### *Unitary or Dual Regimes in History?*

Judge Gros's apparent conclusion that the legal regimes of the continental shelf and the superjacent waters remain quite separate, and accordingly that there is a presumption in favor of two boundaries (or at least a presumption against a single boundary), is based on two complementary lines of reasoning, the one historical and the other exegetical (based on the structure of the 1982 Convention). The historical line of reasoning, based on the immediate postwar law of the sea, takes as its point of departure the proposition that "[t]he two elements have always been treated separately."<sup>96</sup>

Judge Gros's brief review of the history of the law of the sea begins in 1945 with the Truman Proclamation. It is true, of course, that from the emergence of the continental shelf doctrine in the 1940s until the appearance of the doctrine of the exclusive economic zone in the 1970s, the two elements were treated separately. But that is a very short span of time in the history of the law of the sea. With the exception of special situations involving, for example, the exploitation of such seabed resources as oysters (including pearl fisheries), the two elements were generally treated as a natural and juridical unity prior to the emergence of the continental shelf doctrine. The territorial

<sup>96</sup> *Id.* at 367, para. 12.

sea was both an inclusive and an exclusive doctrine that brooked no rivals even of lesser pretensions.

Writing before World War II, Gidel found it difficult to conceive of a dissociation of the seabed from the water column.<sup>97</sup> And even after the emergence of the continental shelf doctrine, Georges Scelle proclaimed his hostility to "the heretical or schismatic conception of the shelf"<sup>98</sup> on account of his conviction that "the sea is physically one."<sup>99</sup> For him, the "discontinuity between submerged lands is pure fiction,"<sup>100</sup> a fiction that violates "the oneness of the maritime domain."<sup>101</sup> A leading modern authority takes the following view:

As an autonomous institution of international law . . . [the] importance [of the doctrine of the continental shelf] is likely to be ephemeral, but as the device which mediated between the high seas and the territorial sea, or between the freedom of the sea and coastal State sovereignty, its historical importance has been of fundamental significance.<sup>102</sup>

It may therefore be argued that so far as either notion is nonhistorical, it is the notion of a dissociation of the two natural elements and the parallel coexistence of two legal regimes in the same geographical space.

#### *Unitary or Dual Regimes in the 1982 Convention?*

While scholarly opinion is divided on the question,<sup>103</sup> there are some grounds and some judicial authority<sup>104</sup> in support of the proposition that a degree of integration of the exclusive economic zone and continental shelf regimes is achieved—or at least is in the process of being achieved—in the 1982 Convention and under customary international law. The text of the Convention is admittedly ambiguous. The Convention contains two parts—part V and part VI—on the exclusive economic zone and the continental shelf, respectively. Article 56, which sets out the "Rights, jurisdiction and duties of the coastal State in the exclusive economic zone," lays down in paragraph 1 that the coastal state has sovereign rights in respect of the nonliving resources of the seabed and subsoil. But paragraph 3 of the same

<sup>97</sup> 3 G. GIDEL, *LE DROIT INTERNATIONAL PUBLIC DE LA MER* 498–501 (1934).

<sup>98</sup> Scelle, *Plateau continental et droit international*, 59 RGDIP 5, 59 (1955) (as translated by the authors).

<sup>99</sup> *Id.* at 52.

<sup>100</sup> *Id.* at 15.

<sup>101</sup> *Id.* at 52.

<sup>102</sup> 1 D. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 467 (1982). O'Connell argues that "[t]he doctrine of the continental shelf has been relegated at the Third Law of the Sea Conference to playing the minor and ancillary role of expanding the exclusive rights of coastal States over the seabed, in a relatively few cases, to distances beyond the 200 miles of the EEZ." *Id.*

<sup>103</sup> In support of integration, see *id.* at 467, 579; Wodie, *supra* note 86, at 762–63. For arguments that the two regimes coexist within the 200-mile limit, see E. EXTAVOUR, *THE EXCLUSIVE ECONOMIC ZONE* 221–28 (1979); Caffisch, *Les Zones maritimes sous juridiction nationale, leurs limites et leur délimitation*, 84 RGDIP 68, 98 (1980).

<sup>104</sup> Tunisia/Libya case, Separate Opinion of Judge Jiménez de Aréchaga, 1982 ICJ REP. at 115, para. 55; Separate Opinion of Judge Oda, *id.* at 233–34, para. 129; and at 249, para. 146.

article provides: "The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI."<sup>105</sup>

The reasons for the maintenance of these separate parts are well known. They have to do with the determination of the wide-margin states, those having a physical continental shelf extending beyond 200 miles from the coast, not to surrender the rights they possessed in respect of the outer continental shelf under the 1958 Continental Shelf Convention and customary international law. These rights might have lapsed if the preexisting regime of the continental shelf had been extinguished and replaced solely by the new regime of the exclusive economic zone. The purpose of maintaining the two parallel parts of the 1982 Convention was therefore to protect the rights of the wide-margin states to jurisdiction over the continental shelf beyond the 200-mile limit.

For some, it is difficult to see how Article 56, paragraph 1 of the 1982 Convention can be read in any way other than as providing for the absorption of the continental shelf within 200 miles into the exclusive economic zone. While the definition and elaboration of rights and duties in respect of the continental shelf in another part of the Convention is admittedly inelegant, this structural peculiarity cannot by itself contradict the "ordinary meaning"<sup>106</sup> of the words of paragraph 1, inasmuch as paragraph 3 provides the link between the two parts that reconciles this structural anomaly with the plain language of paragraph 1.

To the extent that the Convention may be open to more than one interpretation, its terms should be interpreted "in its context and in the light of its object and purpose."<sup>107</sup> The maintenance of a separate part for the continental shelf is the principal source of the ambiguity. The question of interpretation therefore comes down to this: is it necessary to maintain separate regimes within 200 miles in order to preserve rights over the continental shelf beyond 200 miles?

One view is that rights over the shelf beyond 200 miles cannot survive if the natural prolongation of the coastal state is, as it were, interrupted by the 188 miles of the exclusive economic zone.<sup>108</sup> This view has a superficial but not compelling logic. Under customary law, the continental shelf was

<sup>105</sup> Article 76 in part VI of the Convention defines the continental shelf of the coastal state as comprising:

the sea-bed or subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

<sup>106</sup> Art. 31(1), Vienna Convention on the Law of Treaties, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969).

<sup>107</sup> *Id.*

<sup>108</sup> According to one commentator, the ambiguity in the text of the Convention concerning the regime within 200 miles can be explained by the difficulty for the wide-margin states "de prétendre que des fonds marins sis au-delà de la limite de 200 milles forment le 'prolongement naturel' du territoire de l'Etat côtier s'ils étaient séparés de la mer territoriale de cet Etat par un espace de 188 milles." Cafisch, *supra* note 103, at 98.



conceived of as "the natural prolongation or continuation of the land territory or domain or land sovereignty of the coastal State, into and under the high seas, *via the bed of its territorial sea*."<sup>109</sup> If the 3 to 12 miles of the territorial sea did not constitute a fatal interruption in the natural prolongation of the land territory of the coastal state, merely on account of the fact that within that band of sea continental shelf rights were absorbed into the regime of the territorial sea, it is not clear why the "interruption" of the natural prolongation by an additional band of 188 miles of exclusive economic zone should be more prejudicial to the rights of the coastal state over its natural prolongation. In both cases, the legal rights over the resources of the shelf are embraced within another, more comprehensive regime, only to reemerge beyond the outer limit of that more comprehensive regime (subject to an obligation to make payments or contributions in kind to the international community, in the case of the continental shelf beyond 200 miles under the 1982 Convention<sup>110</sup>). This integration of legal rights within 3, 12 or 200 miles does not contradict either the physical fact of natural prolongation or the related juridical concept of natural prolongation that provides the basis for coastal state jurisdiction in respect of the continental shelf, namely, that the continental shelf is "an extension of something already possessed."<sup>111</sup>

In any event, it is clear that the regime of the continental shelf in the 1982 Convention differs in several important respects from that found in earlier customary law and in the 1958 Convention.<sup>112</sup> The change that has attracted the most attention is found in the criteria for determining the seaward limits of the shelf: a minimum of 200 miles from the coast, and beyond that "to the outer edge of the continental margin," defined either in terms of sedimentary thickness or distance from the foot of the continental slope, but not to exceed 350 nautical miles from the coast or 100 nautical miles from the 2,500-meter isobath.<sup>113</sup> This change in the seaward limits of the shelf clearly implies a consequential change in the basis of title, at least in terms of the definition of "natural prolongation."

Article 76 of the 1982 Convention retains the terminology of natural prolongation—consecrated by the Court in the *North Sea* cases—for the continental shelf both within and beyond 200 miles. Although the term "natural prolongation" has geomorphological and geological origins, it has become essentially a legal concept expressive of the basis of title and of the outer limit of that title. In the 1982 Convention, the legal concept of natural prolongation is defined in terms of two alternative or complementary geo-

<sup>109</sup> North Sea cases, 1969 ICJ REP. at 31, para. 43 (emphasis added).

<sup>110</sup> UN Convention on the Law of the Sea, *supra* note 3, Art. 82.

<sup>111</sup> 1969 ICJ REP. at 31, para. 43.

<sup>112</sup> While at least the most essential provisions of parts V and VI of the Convention have very probably become part of customary international law by the time of writing, or will become so in the not too distant future, it is not feasible in this paper to undertake an examination of state practice and official statements to demonstrate the requisite elements of *usus* and *opinio juris sive necessitatis*.

<sup>113</sup> UN Convention on the Law of the Sea, *supra* note 3, Art. 76.

graphical and physical criteria. Where the physical continental shelf extends to a distance of less than 200 miles, natural prolongation is defined solely in terms of geographical adjacency measured from the coast, that is, by the distance criterion; thus, title in respect of the continental shelf up to 200 miles from the coast is determined on precisely the same basis as title in respect of the economic zone (although that zone does not require the doctrinal underpinning of "natural prolongation" that is inherent in the concept of the continental shelf). Where the physical continental shelf extends beyond 200 miles from the coast, natural prolongation is defined by a combination of geological-geomorphological and geographical or distance criteria. It is important to note, however, that once the existence of a natural prolongation extending beyond 200 miles has been established—by the application of these combined criteria—the measurement of that prolongation by the application of the same criteria begins at the coast and not at the 200-mile limit. This tends to support the view that there is a single regime of the continental shelf both within and beyond 200 miles, despite the special provisions applying beyond 200 miles in the 1982 Convention.<sup>114</sup>

#### *A False Dichotomy?*

To frame the issue in terms of two stark alternatives—a unitary regime or dual regimes for the economic zone and continental shelf—may be misleading. Perhaps the exclusive economic zone is best viewed as an umbrella or combined regime that includes the seabed as one of two natural components in a new comprehensive resource regime within 200 miles from the coast. Geography/distance provides a sufficient legal basis for both, but the seabed component retains certain elements of an earlier distinctive regime.

This conception is fully compatible with the structure and language of the 1982 Convention and with the remaining differences between the rights relative to the seabed and the rights relative to the water column within 200 miles. Certain differences may be explained largely by the different nature of the resources included within each of the two natural components. Thus, although the duty to manage and conserve resources appears on the face of Article 56 to apply to both the living and the nonliving resources of the superjacent waters and seabed, this duty is particularized only with respect to living resources. It is an open question whether the duty to manage and conserve the living resources of the 200-mile zone, as spelled out in Article 61, applies to sedentary organisms. Article 77(4), repeating verbatim the language of Article 2(4) of the 1958 Continental Shelf Convention, specifically retains these sedentary resources in the continental shelf regime set out in part VI of the 1982 Convention. The absence of any provision applying to the mineral resources of the shelf the duties specified in Article 62 with regard to optimum utilization of living resources and the allocation of any surplus may be explained partly by the difference between renewable and

<sup>114</sup> *Id.*, Arts. 76 and 82. It is noteworthy that the coastal state must submit to an international commission information on the limits of its outer continental shelf. The commission makes recommendations to the coastal state on these outer limits.

nonrenewable resources. Part of the explanation, however, also lies in the different socioeconomic factors related to the exploitation of these resources, and the separate historical development of the two regimes.

Another difference between the rights applying to the two components of the exclusive economic zone stems from the fact that part V of the 1982 Convention does not incorporate provisions similar to those contained in Article 77(2) and (3) with respect to the continental shelf:

(2) The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

(3) The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

The absence of such a provision in part V means that, unless the coastal state takes some positive legal act to establish an exclusive economic zone, the living resources of the waters overlying its continental shelf may be exploited by the nationals of other states without its permission.

These differences between the rights relative to the seabed and those relative to the superjacent waters tend to strengthen the idea that, although the continental shelf within 200 miles is included in the regime of the exclusive economic zone, it retains some measure of juridical autonomy and distinctiveness within the general framework of the zone. Thus, the merger or integration of the two regimes is partial rather than absolute. But that partial integration bears upon the legal basis of title and this alone seems to enhance the importance of geography in delimitation and to justify—if justification is needed—the concept of the single maritime boundary as a legally permissible, although not necessarily mandatory, approach to the delimitation of the exclusive economic zone. The Chamber clearly did not err in upholding the validity of this approach. For in giving primacy to the “neutral” factor of geography, as being equally suitable to the delimitation of both the seabed and the water column within 200 miles, the Chamber was implicitly giving effect to a common denominator in the legal basis of title for the continental shelf and the exclusive economic zone. The Chamber, however, did not specifically address the question of the unity or duality of regimes, or the question whether there is a legal presumption in favor of a single line delimiting all the rights and jurisdictions embraced within the doctrine of the exclusive economic zone. Thus, both questions remain open.

#### *Practical and Legal Consequences of Two Boundaries*

While Judge Gros poses the alternative “either two legal regimes or chaos”<sup>115</sup> on account of the problems of interpretation arising from the admittedly awkward structure of the 1982 Convention, it seems more immediately evident that the parallel jurisdiction of two states in the same maritime

<sup>115</sup> Dissenting Opinion of Judge Gros, 1984 ICJ REP. 367–77, paras. 12–26.

space would carry great potential for administrative chaos and political conflict. Supposing there were a presumption in favor of two boundaries, it may also be supposed that such a presumption could be overcome by the agreement of the states concerned, at least in the context of a negotiated settlement. But it cannot be assumed that states will always agree to adopt a single boundary. It is easy enough to foresee situations in which a state will be convinced it has a stronger legal basis for a more extensive claim over one of the two elements, on the basis of arguments relating to such factors as the physical structure of the seabed. Such claims would create still greater conflict in a field already sufficiently plagued by conflict.

But, assuming agreement by the parties on a single maritime boundary, what would the effect of a presumption in favor of two boundaries be in the context of an adjudicated settlement? Would the tribunal be obliged to reject the request for a single line? Or would it be obliged first to establish a line on the basis of factors relating to, say, the seabed, and then to establish another on the basis of factors relating to the water column? If the two lines did not coincide, what would the legal basis be for favoring one over the other? (This, of course, was the question put to the parties by the President of the Chamber in the *Gulf of Maine* proceedings, as noted earlier.) Or, alternatively, what would the legal basis be for fusing the two lines into a single line somewhere in between? It was to avoid such a situation that the Canadian pleadings in the *Gulf of Maine* case insisted on the need for the *simultaneous* delimitation of the seabed and the water column, by a single global operation—all in one swoop, so to speak.<sup>116</sup>

It does not require a great deal of imagination to envisage the kinds of problems that would arise if one state were to have jurisdiction over rich hydrocarbon resources in the continental shelf, while another state had jurisdiction over valuable fishery resources in the superjacent waters. The domestic litigation in the late 1970s and early 1980s over oil and gas lease sales on the United States continental shelf, in areas such as Georges Bank, illustrates the conflict of interests between oil and gas exploitation, on the one hand, and fisheries and environmental concerns, on the other.<sup>117</sup> Such unavoidable conflicts are likely to be greatly exacerbated if both divergent political interests and separate sovereign powers are allowed to compete in the same geographical space.

In his dissenting opinion in the *Tunisia / Libya* case, Judge Oda posed the question in the following terms:

Is it congruous or conceivable that the same marine/submarine column should be placed under different national jurisdictions for the same purpose of resource exploitation, however different the resources may be, and that the same area of the ocean be consequently policed by two different States? One is entitled to enquire whether superimposition of

<sup>116</sup> See, e.g., statement by Prof. Prosper Weil, Counsel for Canada, C 1/CR 84/6, at 13 (Apr. 6).

<sup>117</sup> *Conservation Law Foundation v. Andrus*, 617 S.2d 296 (1st Cir.), 623 S.2d 712 (1st Cir. 1979); *Massachusetts v. Andrus*, 594 S.2d 872 (1st Cir. 1979).

two different boundaries is tolerable as a matter of international *ordre public*.<sup>118</sup>

There may, of course, be instances where for special historical, political or practical reasons related, for example, to established patterns of resource exploitation, states will wish to provide for divergent boundaries for the seabed and superjacent waters,<sup>119</sup> or for joint zones of exploitation or jurisdiction, or both. Such zones could be of various kinds. They might take the form of condominiums or interim arrangements without prejudice to delimitation,<sup>120</sup> or permanent arrangements for the joint or cooperative exploitation of resources in a zone superimposed on jurisdictional boundaries.<sup>121</sup> Or they might take the form of regional arrangements for the common exploitation of fishery resources irrespective of and without prejudice to delimitation.<sup>122</sup> In any event, it seems clear that wherever resource jurisdiction over the seabed and over the superjacent waters does not coincide, it will be necessary to agree on detailed rules that will permit the harmonious and efficient exploitation of the resources in the two elements. Such agreements might well include institutional arrangements for consultation or joint decision making, preferably with dispute settlement procedures. In order to ensure their effective operation, these agreements would need to be similar to those established for joint exploitation zones.<sup>123</sup>

<sup>118</sup> 1982 ICJ REP. at 232, para. 126. Judge Evensen in his dissenting opinion stated that it seemed "reasonable" that the lines dividing the exclusive economic zone and the continental shelf should "coincide." *Id.* at 296, para. 15. He also referred to the "obvious advisability of having identical lines of delimitation for the continental shelf and the 200-mile Exclusive Economic Zone." *Id.* at 319, Conclusions.

<sup>119</sup> An example is the Treaty Between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as the Torres Strait, and Related Matters; *reprinted in* 18 ILM 291 (1979).

<sup>120</sup> See Agreement Between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, Feb. 5, 1974, *reprinted in* U.S. DEP'T OF STATE, OFFICE OF THE GEOGRAPHER, INTERNATIONAL BOUNDARY STUDY, SERIES A, LIMITS IN THE SEAS, No. 75 (1977). Article XXVIII of the Agreement provides: "Nothing in this Agreement shall be regarded as determining the question of sovereign rights over all or any portion of the Joint Development Zone or as prejudicing the positions of the respective Parties with respect to the delimitation of the continental shelf."

<sup>121</sup> See Agreement Between Norway and Iceland on the Continental Shelf in the Area between Iceland and Jan Mayen, *done* Oct. 22, 1981 (entered into force June 2, 1982), *reprinted in* 21 ILM 1222 (1982). This Agreement established a continental shelf boundary coinciding with the exclusive economic zone boundary already established between the two countries, as well as a permanent joint exploitation zone for continental shelf resources in the area of the Jan Mayen Ridge. See also the Agreement Between Canada and the United States of America on East Coast Fishery Resources, *signed* Mar. 29, 1979, S. EXEC. DOC. V, 96th Cong., 1st Sess. (1979). This Agreement, withdrawn by President Reagan from Senate consideration on Mar. 6, 1981, provided for the joint management, conservation and exploitation of fishery resources in the Gulf of Maine/Georges Bank area, on a permanent basis, irrespective of and without prejudice to the determination by the International Court of Justice of a single maritime boundary dividing the continental shelf and fishing zones of the two countries.

<sup>122</sup> See, e.g., the Common Fisheries Policy of the European Economic Community.

<sup>123</sup> The Japan/Korea Joint Exploitation Zone established pursuant to the Agreement cited in note 120 *supra*, and the abortive Canada/U.S. East Coast Fishery Agreement, *supra* note



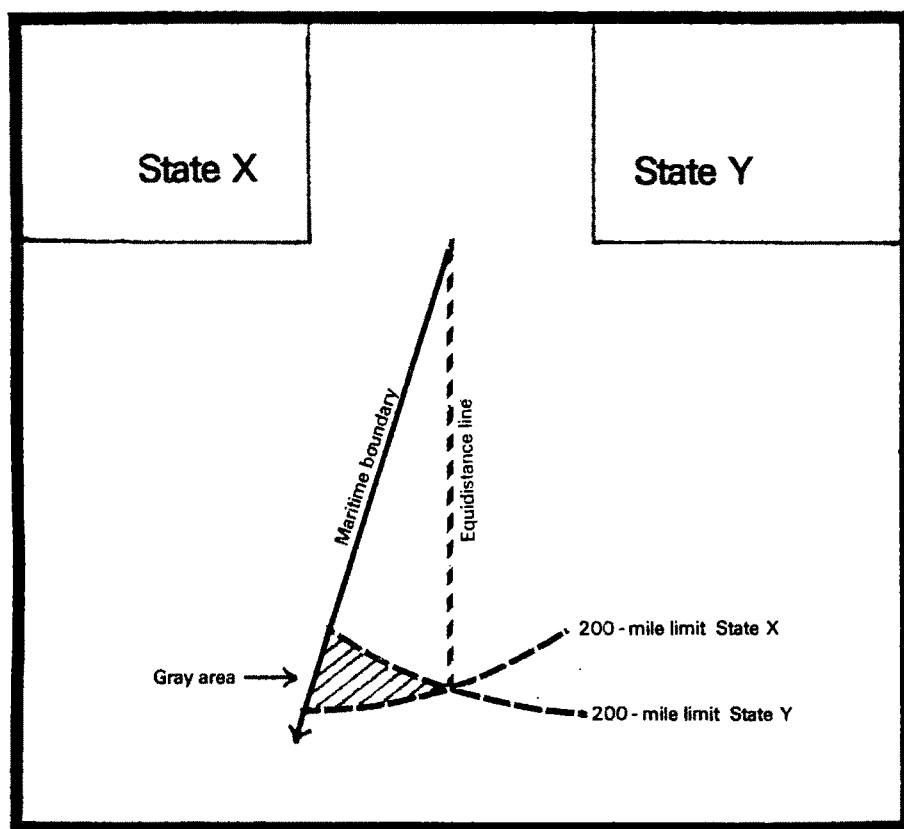


FIGURE 1  
THE GRAY AREA

### *The "Gray Area Problem"*

Even a single maritime boundary will not necessarily always allow states to avoid problems of divided jurisdiction—or at least not without creating problems of another kind. As illustrated in the accompanying diagram, only a single boundary that intersects the 200-mile limits of the exclusive economic zones at a point equidistant from the coasts of both states can allocate all sea areas within 200 miles of both states for all purposes under international law. If the boundary intersects the 200-mile limit of each state at a point other than the equidistant point, it will create a "gray area" within 200 miles

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121, contain detailed rules for joint exploitation, as well as institutional arrangements and dispute settlement procedures. The Australia/Papua New Guinea Agreement, *supra* note 119, and the Norway/Iceland Agreement, *supra* note 121, provide only a very general framework, leaving the details of administration to be worked out by the two Governments. While the Norway/Iceland Agreement provides for compulsory arbitration of disputes (Art. 9), the Australia/Papua New Guinea Agreement provides that disputes shall be settled by "consultation or negotiation" (Art. 19).

of the coast of one party that is beyond the 200-mile jurisdictional range of the other party on whose side of the boundary it falls. Within this area, *neither* party could exercise exclusive economic zone or fisheries jurisdiction. One party would be precluded from exercising such jurisdiction because the area is more than 200 miles from its own coast, and the other party equally would be precluded because the area lies on the "wrong" side of the single maritime boundary.

This factor is of especially great practical importance where a single maritime boundary is to be extended for continental shelf purposes *beyond* the area in which the 200-mile limits of the parties overlap. If the boundary were to be extended seaward in a manner consistent with its final direction at the 200-mile limit, at a point well away from the equidistant point, there would be two possible outcomes. If the single maritime boundary principle were maintained, one party would have continental shelf jurisdiction within the gray area, and *neither* party would have fisheries or exclusive economic zone jurisdiction. Alternatively, if the parties were willing to accept overlapping jurisdiction in the gray area, one party would have continental shelf jurisdiction and the other party would have fisheries and water column jurisdiction in exactly the same area.<sup>124</sup> This suggests that the creation of a substantial gray area should be avoided to the greatest extent possible.

*Established Continental Shelf Boundaries and the Exclusive Economic Zone*

Another important issue that arises is the question whether the approximately 55 boundaries that have already been agreed or adjudicated for the continental shelf alone will also be used as the boundaries for the exclusive economic zone, or whether new boundaries will have to be determined for this purpose.<sup>125</sup> The Chamber's treatment of the 1958 Continental Shelf Convention in the determination of the single maritime boundary in the *Gulf of Maine* case is germane to this issue.

The parties agreed that Article 6 of the 1958 Convention, to which both countries are parties, was binding upon them. The United States argued that although Article 6 was "relevant to these proceedings as a source of principles and rules for delimitation of the continental shelf," it was "not determinative" in the delimitation of a single maritime boundary.<sup>126</sup> Canada, for its part, argued:

"[T]he equidistance-special circumstances rule" of Article 6 is applicable to this case as the particular expression of a general norm of delimitation and, moreover, . . . it has obligatory force to the extent that the delimitation of a single maritime boundary in the present case involves the delimitation of the continental shelf.<sup>127</sup>

<sup>124</sup> Can. C.-Mem. at 237-42, paras. 570-576.

<sup>125</sup> This figure was calculated from the information contained in the Analytical Table in Canadian Reply, 1 Annexes at 21-34.

<sup>126</sup> U.S. Mem. at 101, para. 165.

<sup>127</sup> Canadian Reply at 144, para. 330. See also Can. Mem. at 120, paras. 281-282, and Can. C.-Mem. at 228-29, paras. 547-551.

As noted earlier, the Chamber found that Article 6 was not applicable to the determination of a single line for both the continental shelf and the fishing zone:

It is doubtful whether a treaty obligation which is in terms confined to the delimitation of the continental shelf can be extended, in a manner that would manifestly go beyond the limits imposed by the strict criteria governing the interpretation of treaty instruments, to a field which is evidently much greater, unquestionably heterogeneous, and accordingly fundamentally different. Apart from this formal, but important, consideration, there is the more substantive point that such an interpretation would, in the final analysis, make the maritime water mass overlying the continental shelf a mere accessory of that shelf. Such a result would be just as unacceptable as the converse result produced by simply extending to the continental shelf the application of a method of delimitation adopted for the "water column" only and its fish resources.<sup>128</sup>

Many states will wish, as a matter of policy, to use the same line for both purposes. But where states do not agree that it would be in their common interest simply to adopt the existing continental shelf boundary for all other purposes, the relationship between the continental shelf and the exclusive economic zone might determine the legal effect of the continental shelf boundary for other forms of jurisdiction.<sup>129</sup>

If it is supposed that the two regimes are quite separate, there appears to be no legal presumption that the water column boundary must coincide with an established continental shelf boundary. If, however, it is assumed that the continental shelf has been integrated into the regime of the exclusive economic zone, the problem is more difficult to resolve. One possible view, arguing by analogy with the Chamber's reasoning on the nonapplicability of Article 6 to a single maritime boundary, is that a boundary "which is in terms confined . . . to the continental shelf" cannot "be extended in a manner that would manifestly go beyond the limits imposed by strict criteria governing delimitation of the continental shelf" to a legal regime "which is evidently much greater, unquestionably heterogeneous, and accordingly fundamentally different."<sup>130</sup> Moreover, if the legal regime governing the object of the original delimitation is considered to have lapsed because the seabed has been entirely merged with the regime of the exclusive economic zone, then it might be considered that a boundary fixed in accordance with the former regime, and dividing jurisdiction exercised pursuant to that regime, has also "lapsed."

Alternatively, it may be considered that the legal regime of the continental shelf has not lapsed as such but has only been subsumed within the regime of the exclusive economic zone. The continental shelf boundary therefore

<sup>128</sup> 1984 ICJ REP. at 301, para. 119.

<sup>129</sup> This could happen where a continental shelf boundary has been established on the basis of geological or geomorphological criteria, and an equidistance or other line based on criteria derived from the coastal geography would allocate a larger area to one of the parties.

<sup>130</sup> Gulf of Maine case, 1984 ICJ REP. at 301, para. 119.

would remain valid, at least for the shelf component of the economic zone. It could further be argued that the boundary for the fishing zone or exclusive economic zone must be the same as the shelf boundary because the principal relevant circumstance for continental shelf and for fishing zone or exclusive economic zone boundaries is coastal geography. This factor is, as the Chamber observed, constant or "neutral" for both objects of the delimitation. Thus, while an established continental shelf boundary would generally serve as the boundary for the exclusive economic zone, this presumption could presumably be rebutted by a showing that material weight was attributed to factors other than coastal geography in determining the course of the continental shelf boundary, and that these factors would have little or no relevance to a water column boundary.

### CONCLUSION

The new zones of jurisdiction of the coastal state that have emerged in the law of the sea have given rise to the new phenomenon of the single maritime boundary beyond the limits of the territorial sea. In determining the first such boundary to be settled by international adjudication, the Chamber of the International Court of Justice in the *Gulf of Maine* case has adapted the law of continental shelf delimitation to this new phenomenon, while rejecting the application of Article 6 of the Continental Shelf Convention to such a multipurpose delimitation. In so doing, the Chamber has clarified the law by effectively limiting the range of circumstances considered legally relevant, and has elaborated a more systematic process for taking account of relevant circumstances and equitable criteria in order to achieve an equitable result. Most important, the Chamber has given—or restored—a paramount role to coastal geography, relegating human activity and state conduct to a clearly subordinate role and effectively excluding the physical and ecological characteristics of the seabed and overlying waters as relevant factors.

The Chamber's exclusion or subordination of nongeographical factors in a single maritime boundary delimitation did not depend on any fusion of the legal regimes of the exclusive economic zone and of the continental shelf within 200 miles of the coast. The major change the Chamber brought to the role of geography in the law of maritime boundaries was its justification of that role on the ground of "neutrality." A more solid, but not incompatible, ground, perhaps, is afforded by the fact that geographical adjacency measured by the distance criterion has become the sole basis of title to the exclusive economic zone and a sufficient basis of title to the continental shelf within 200 miles of the coast. In this respect at least, there has been a partial fusion or integration of the two regimes despite the remaining differences between them. Thus, geography is not so much the most neutral factor as the most *positive* factor in relation to both the seabed and the water column. And this alone would appear to provide a legal basis for the concept of a single maritime boundary, determined in a single, simultaneous delimitation.

What remains an open question is whether there is a legal presumption for or against a single multipurpose line. Considerations of international public order appear to militate in favor of one line. These issues are of concern not only for future delimitations but for existing continental shelf boundaries.

Whatever the broader implications of the *Gulf of Maine* case, the single maritime boundary approach was undoubtedly the right one for Canada and the United States in resolving their long and complex jurisdictional dispute on the East Coast. Both countries brought spirited advocacy to their examination of the issues raised by this new concept; both can take satisfaction in the fact that the Chamber was able to find its way through these issues to the applicable law for the delimitation of their zones of jurisdiction from sea to seabed, from the continental shelf to its overlying waters.

## NOTES AND COMMENTS

### LITIGATION IMPLICATIONS OF THE U.S. WITHDRAWAL FROM THE NICARAGUA CASE

On January 18, 1985, the Department of State issued a formal "Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice."<sup>1</sup> This statement was supported by "Observations on the International Court of Justice's November 26, 1984 Judgment on Jurisdiction and Admissibility in the Case of *Nicaragua v. United States of America*."<sup>2</sup> These two documents, and the 1984 Judgment of the Court on jurisdiction and admissibility, have already received extensive critical and expository comments in the April 1985 issue of this *Journal*.<sup>3</sup>

The purpose of this Note is not to duplicate these comments or to examine further in any detail the jurisdictional Judgment, as to which there has already been ample discussion and which, together with the individual opinions of the judges, speaks for itself.<sup>4</sup>

Nor is it the purpose of this Note to comment on the merits of a case currently in process. We now find ourselves in the midstream of litigation, awaiting the outcome of the proceedings on the merits of the case in spite of the nonparticipation of the United States.<sup>5</sup> We have not had the benefit of reviewing the pleadings of Nicaragua, since written pleadings are kept confidential until the commencement of oral proceedings in a contentious case of this nature.<sup>6</sup> Any in-depth analysis of the current litigation posture would therefore be either ill-informed or conclusory.

<sup>1</sup> Reprinted in 24 ILM 246 (1985), and in large part in 79 AJIL 439 (1985) [referred to variously herein as the statement or the departmental statement].

<sup>2</sup> 24 ILM at 249, 79 AJIL at 423.

<sup>3</sup> See the Editorial Comments by Herbert W. Briggs and Thomas M. Franck, respectively entitled *Nicaragua v. United States: Jurisdiction and Admissibility* and *Icy Day at the ICJ*, at 79 AJIL 373 and 379 (1985); note on the U.S. withdrawal under Contemporary Practice of the United States Relating to International Law by Marian Nash Leigh, *id.* at 438-41; note under Judicial Decisions by Monroe Leigh, *id.* at 442-46; and Editorial Comment on *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court* by Anthony D'Amato, *id.* at 385.

<sup>4</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26), reprinted in 24 ILM at 59 (including separate and dissenting opinions).

<sup>5</sup> The Court's Communiqué No. 85/14 of June 26, 1985 announced that "[o]n Thursday 12 September 1985, at 10 a.m. at the Peace Palace in The Hague, the Court will begin oral proceedings on the merits of the case concerning *Military and Paramilitary Activities in and against Nicaragua*, between Nicaragua and the United States of America."

<sup>6</sup> Rules of the International Court of Justice [Rules], Art. 55, reprinted in 73 AJIL 748, 765 (1979). See 2 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 566-67, sec. 233 (1965):

The documents of the written proceedings are regarded as confidential until after judgment is rendered; and in principle are not available to the general public or to other States. However, Article 44 of the Rules enables the Court, or the President if the Court

Rather, the purpose of this Note is to consider the wisdom, from a litigation point of view, of the U.S. withdrawal from the proceedings following the 1984 Judgment and to compare the present situation to one which existed some 20 years ago, in a wholly different context, and which produced a completely surprising outcome.

#### THE SITUATION IN BRIEF UNDER ARTICLE 53 OF THE STATUTE

Under its Statute and its practice, the Court is proceeding to hear the *Nicaragua* case out, whether or not the United States appears in Court.<sup>7</sup> Article 53 of the Statute of the Court provides that:

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.<sup>8</sup>

Of the nine cases presented since 1945 to the International Court in which there has been some substantial form of nonappearance,<sup>9</sup> only one is

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is not sitting, after obtaining the views of the parties, to decide that the Registrar shall in a particular case make the pleadings and annexed documents available to the Government of any member of the United Nations or of any State which is entitled to appear before the Court.

*Id.* at 566.

<sup>7</sup> See note 5 *supra*.

<sup>8</sup> Indeed, the Court's January communiqué stated that Nicaragua had already exercised its rights under Article 53, paragraph 1:

On 22 January 1985 the President received the Agent of Nicaragua, who informed him that his Government maintained its application and availed itself of the rights provided for in Article 53 of the Statute whenever one of the parties does not appear before the Court or fails to defend its case.

ICJ Communiqué No. 85/1, Jan. 23, 1985. The President of the Court then fixed the respective time limits for the Memorial of Nicaragua and the Counter-Memorial of the United States as being, respectively, Apr. 30 and May 31, 1985. *Id.*

<sup>9</sup> Corfu Channel (UK v. Alb.), Assessment of Amount of Compensation, 1949 ICJ REP. 244 (Judgment of Dec. 15); Anglo-Iranian Oil Co. (UK v. Iran), Interim Protection, 1951 ICJ REP. 89 (Order of July 5), and Preliminary Objections, 1952 ICJ REP. 93 (Judgment of July 22); Nottebohm (Liechtenstein v. Guat.), Preliminary Objection, 1953 ICJ REP. 111 (Judgment of Nov. 18); Fisheries Jurisdiction (UK v. Ice.; FRG v. Ice.), Jurisdiction of the Court, 1973 ICJ REP. 3, 49 (Judgments of Feb. 2), and Merits, 1974 ICJ REP. 3, 175 (Judgments of July 24); Trial of Pakistani Prisoners of War (Pak. v. India), Interim Protection, 1973 ICJ REP. 328 (Order of July 13), and removal from list, *id.* at 347 (Order of Dec. 15); Nuclear Tests (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ REP. 253, 457 (Judgments of Dec. 20); Aegean Sea Continental Shelf (Greece v. Turk.), Interim Protection, 1976 ICJ REP. 3 (Order of Sept. 11), and 1978 ICJ REP. 3 (Judgment of Dec. 19); and United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (Judgment of May 24) [referred to variously as the Hostages case or the Iranian Hostages case]. (The seven cases summarily removed from the Court's list between 1954 and 1959 for want of jurisdiction need not concern us here: the *Treatment in Hungary of Aircraft and Crew of the United States of America* cases, the *Antarctica* cases and the *Aerial Incident* cases.)

properly analogous to the present situation: where the respondent state at first appeared in order to contest a principal phase of the case, but subsequently withdrew from participation. Although the situation presented by the current *Nicaragua* case is unique—no other precedent has involved a withdrawal or failure to participate by a state that occurred *after* the Court had rendered an adverse jurisdictional decision but *before* the Court rendered a judgment on the merits—there is a limited precedent: in the compensation phase of the *Corfu Channel* case, Albania did in fact participate in the merits phase only to withdraw from the case in its later stage concerning the assessment of damages and compensation.<sup>10</sup> The Court had no difficulty in the damages phase in applying Article 53 of the Statute explicitly for the first time, in spite of Albania's absence.<sup>11</sup>

Much the same result can therefore be expected in the merits phase of the *Nicaragua* case. Considerable attention may be given by the Court to the issue concerning the nature of the evidence adduced by Nicaragua and as to which no contrary evidence or argument will have been produced by the United States. The Court must, however, attempt to reach a conclusion, even where some or much of the evidence may be difficult to evaluate; otherwise, all a respondent in such a case would have to do, to make the work of the Court impossible, would be to fail to appear.<sup>12</sup> The Court must satisfy itself as to the substance of the merits of the claims advanced by Nicaragua; here one should recall the Court's language in the *Hostages* case:

<sup>10</sup> *Corfu Channel* (UK v. Alb.), Merits, 1949 ICJ REP. 4 (Judgment of Apr. 9). Albania contested the jurisdiction of the Court to consider and assess the amount of damages owing to the United Kingdom, and did not appear in the later phase of the case. Thus, Albania's actual nonappearance was limited only to the phase of the proceedings concerning the Court's evaluation of damages. See also S. ROSENNE, *supra* note 6, at 590–91; G. GUYOMAR, LE DÉFAUT DES PARTIES À UN DIFFÉREND DEVANT LES JURIDICTIONS INTERNATIONALES 30, 201–03 (1960).

<sup>11</sup> 1949 ICJ REP. at 248:

The position adopted by the Albanian Government brings into operation Article 53 of the Statute, which applies to procedure in default of appearance. This Article entitles the United Kingdom Government to call upon the Court to decide in favour of its claim, and, on the other hand, obliges the Court to satisfy itself that the claim is well founded in fact and law. While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded.

<sup>12</sup> As Guyomar stated in her discussion of the *Corfu Channel* case:

L'article 53, déclare la Cour, n'a pas pour effet de lui imposer une vérification minutieuse des conclusions présentées par la partie comparante. Par les voies qu'elle estime appropriées, elle se doit simplement d'acquiescer la conviction que ces conclusions sont justes. Elle examine donc avec impartialité les allégations du demandeur et pour ce faire, elle s'entoure, si besoin est, de toutes les garanties nécessaires. C'est ainsi qu'en l'espèce elle sollicita l'avis d'experts choisis parmi les nationaux d'une puissance neutre par rapport au litige.

G. GUYOMAR, *supra* note 10, at 203. (This is, of course, precisely what the Court did in the *Corfu Channel* compensation proceedings when it appointed experts to assess the amount of the damages. See S. ROSENNE, *supra* note 6, at 579.)



The Iranian Government, notwithstanding the terms of the Court's Order, did not file any pleadings and did not appear before the Court. *By its own choice, therefore, it has forgone the opportunities offered to it under the Statute and Rules of Court to submit evidence and arguments in support of its contention in regard to the "overall problem".*<sup>13</sup>

Absence from the proceedings is therefore interpreted by the Court, within the context of its Statute and Rules, as a form of waiver of rights by the nonappearing state—an acquiescence to the result that the proceeding may now go forward in accordance with the provisions of Article 53 (subject, of course, to its requirement that the Court satisfy itself that “the claim [of the applicant state] is well founded in fact and in law”). The absent respondent state is deemed to have “forgone the opportunities offered to it under the Statute and Rules of Court to submit evidence and arguments in support of its contention.”<sup>14</sup>

What effect might there be, from a litigating point of view, on the applicant? Obviously, pains must be taken—perhaps even more than in the case of a normal contested contentious proceeding—for the applicant state to present as clear and comprehensive an argument as possible, and as convincing and uncontrovertible evidence as may be available.<sup>15</sup> One additional (and perhaps subtle) difference that may convey a legal impact upon the litigating position of the applicant state is that it may not be possible for it to amend its submissions (or to do so with any substantive effect) in the absence of the nonappearing state.<sup>16</sup> It seems more likely that in a case of

<sup>13</sup> 1980 ICJ REP. at 20, para. 37 (emphasis added).

<sup>14</sup> In paragraph 33 of its Judgment in the *Hostages* case, the Court said the following:

It is to be regretted that the Iranian Government has not appeared before the Court in order to put forward its arguments on the questions of law and of fact which arise in the present case; and that, in consequence, the Court has not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. Nevertheless, in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, *proprio motu*, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant's case.

*Id.* at 18.

<sup>15</sup> Note that the Court in the *Hostages* case relied extensively on its ability to take judicial notice or cognizance of matters of public record (*id.* at 9, 10, paras. 12, 13); query how this may be applied in the context of the *Nicaragua* case—specifically in the context of public governmental disclosures and congressional statements and proceedings.

<sup>16</sup> Thus Guyomar:

Le défaut d'une des parties devrait en principe produire un autre effet. Il serait en effet équitable de décider que le comparant, à partir du moment où le défaut se produit, ne peut plus modifier ses conclusions. Cette solution est admise par la plupart des législations internes; le défaillant doit savoir avec précision quelles questions vont être jugées et quelles sont exactement les prétentions de son adversaire (si elles avaient été autres, peut-être se serait-il décidé à comparaître ou à se défendre). Il importe également qu'il ait connaissance de ces points à une époque où il lui sera possible, s'il le désire, de présenter une argumentation complète et détaillée. Ces questions importantes ne sont tranchées ni par le statut ni par le règlement. Il semble bien cependant que l'article 53, en stipulant que le comparant peut 'demander à la Cour de lui adjuger ses conclusions' exclut toutes modi-

this type, in the event of an attempt by the applicant to alter its submissions after the default or nonappearance has occurred, the Court would probably not restrict the applicant's freedom to amend submissions in precise detail, but would effectively discourage any substantial amendment to the "claim" that has been made, disregarding any argument or case presented to the contrary in order to avoid any imputation of surprise or procedural unfairness.<sup>17</sup> In substance, however, it would be imprudent counsel who would suggest any substantial modification or amendment to the submissions of the applicant state as originally filed—or, indeed, any modification whatever.

The effect on the Court of nonappearance (or, perhaps worse, of a withdrawal as dramatic as that which has occurred in the *Nicaragua* case) could hardly be salutary. It must always be a clear disappointment for the Court to have one party absent, and thus unable to assist it (and in a sense therefore to protect it) in its determinations of fact and law.<sup>18</sup>

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fications de celles-ci par la suite. Il est assez vraisemblable que la Cour se prononcerait en ce sens.

G. GUYOMAR, *supra* note 10, at 194.

It is the view of this writer that while the Court would probably not explicitly restrict the appearing applicant state from making any amendments to its submissions as such, it would nevertheless discourage any substantial change in the "claim" that has been made and would effectively disregard any major amendment to the submissions implementing it, in order to avoid any imputation of surprise or procedural unfairness in the case. In this context, note the small verbal difference between the English and the French versions of Article 53 of the Statute; the French version says that "2. La Cour, avant d'y faire droit, doit s'assurer non seulement qu'elle a compétence aux termes des articles 36 et 37, mais que les conclusions sont fondées en fait et en droit," and the English version requires that the Court must "satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law" (emphasis added).

<sup>17</sup> Cf. the provision for the reading of the "final submissions" ("*conclusions finales*") by each party in Article 60, paragraph 2 of the Rules, which naturally implies that there may be differences between the submissions as originally made and the final submissions of a party. See also discussion in S. ROSENNE, *supra* note 6, at 358–59, referring to the *Société Commerciale de Belgique* case, 1939 PCIJ, ser. A/B, No. 78, at 173, and stating:

Here, in the case of the written and oral proceedings the character of the case was "profoundly transformed" by the applicant government, and the Court found it necessary to consider whether the Statute of the Court authorize[d] the parties to do this. The Court distinguished between the right of the parties to amend their submissions, and the transformation of the dispute, by amendments to the submissions, into another dispute which is different in character.

<sup>18</sup> See, e.g., the comments by the Court in paragraphs 12 and 13 of the respective Judgments in the *Fisheries Jurisdiction* cases:

It is to be regretted that the Government of Iceland has failed to appear in order to plead the objections to the Court's jurisdiction which it is understood to entertain. Nevertheless the Court, in accordance with its Statute and its settled jurisprudence, must examine *proprio motu* the question of its own jurisdiction. . . . Furthermore, in the present case the duty of the Court to make this examination on its own initiative is reinforced by the terms of Article 53 of the Statute of the Court.

1973 ICJ REP. at 7 and 54. To the same effect are paragraphs 15 of the two Judgments in the *Nuclear Tests* cases:

From the point of view of the respondent United States, what was the advantage of withdrawal? As a legal matter, there was nothing to lose by continuing to appear: no question here of a *forum prorogatum*, or implication of acquiescence or novation of a consent to jurisdiction.<sup>19</sup> The decision of the Court, possessing as it does the "binding force" attributed under Article 59 of the Statute, can have no greater and no less effect no matter what the United States does or does not do.<sup>20</sup> From a legal point of view, the decision made by the United States to withdraw seems to have little to recommend it except a certain dogmatic consistency or loyalty to its earlier arguments.

What about the political element? Would the United States have appeared to "concede"—despite its earlier arguments—that the Court's jurisdiction was "valid"?<sup>21</sup> Here it may be useful, and interesting, to recall a small lesson of history.

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It is to be regretted that the French Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings, and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. The Court nevertheless has to proceed and reach a conclusion, and in doing so must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law.

1974 ICJ REP. at 257 and 461.

<sup>19</sup> S. ROSENNE, *supra* note 6, at 344–63, and especially at 360, citing Anglo-Iranian Oil Co., 1952 ICJ REP. at 114:

The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court. But that Government has consistently denied the jurisdiction of the Court. Having filed a Preliminary Objection for the purpose of disputing the jurisdiction, it has throughout the proceedings maintained that Objection. It is true that it has submitted other Objections which have no direct bearing on the question of jurisdiction. But they are clearly designed as measures of defence which it would be necessary to examine only if Iran's Objection to the jurisdiction were rejected. No element of consent can be deduced from such conduct on the part of the Government of Iran.

<sup>20</sup> A party cannot, of course, determine the jurisdiction of the Court; this power is reserved for the Court itself: Article 36, paragraph 6 of the Statute provides that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." It makes no difference what the expressed view of one of the parties to a dispute may be, once the Court has established that it has jurisdiction to consider the case. Moreover, such a decision in the form of a judgment possesses "binding force" under Article 59 of the Statute, and Article 60 is unequivocal: "The judgment is final and without appeal." ICJ Statute, Art. 59; see also S. ROSENNE, *supra* note 6, at 438 and 440; also sec. 192, *id.* at 461–63. It is, however, not practicable to contemplate "compliance" by a party to a judgment of the Court on the matter of admissibility or jurisdiction, since the respondent state is free to appear or not, subject to the rule of Article 53 that the Court may proceed with full authority upon the request of the applicant.

<sup>21</sup> The "*dispositif*" or operative language of the Judgment in the *Nicaragua* case runs only to the jurisdiction and ability of the Court itself to hear the merits of the case, and of course

## AN UNHEEDED LESSON FROM THE PAST?

In 1960 Ethiopia and Liberia instituted proceedings by application against the (then) Government of the Union of South Africa in respect of its accountability under and conduct of the Mandate for German South-West Africa. This instituted the great and—in the opinions of many—the ultimately disastrous litigation known as the *South West Africa Cases*, which fell clearly into two parts: the preliminary objections<sup>22</sup> and the merits, or what the Court subsequently termed “Second Phase,” inasmuch as the “merits”—as such—were never reached.<sup>23</sup> Generally recognized as the longest and most tortuous proceeding ever brought before the Court, including even the *Barcelona Traction* case of the same era, the *South West Africa Cases* represent a singular lesson in successful litigation tenacity on the part of the respondent, South Africa.

It was well known at the time that it had only been by the barest of margins that South Africa had even made the decision to appear in the Court in the first place.<sup>24</sup> How practical and providential—for South Africa—that decision turned out to be. Yet, analytically, South Africa had nothing to lose, and everything to gain, by making an appearance. It was a gamble that it could only win, even if the odds were considered to be slight at the time. There was no way in which South Africa could find itself *worse off* by appearing, than it would be by not appearing—save for the relatively inconsiderable element of the expense of mounting a legal defense.

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contains no operative language subject to “compliance” or “non-compliance” by either party, in terms of Article 94 of the Charter. See S. ROSENNE, *supra* note 6, at 127:

Side by side with the undertaking to comply with the decision of the Court contained in Article 94(1) of the Charter, there exists a general principle of international law according to which, when States agree to submit their dispute to an international tribunal, they assume the obligation to comply with the decision of that tribunal. In this respect the Charter merely casts in the form of a conventional rule that which already exists as a general principle of customary international law. . . .

See also H. THIRLWAY, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* 64–82 (1985). In theory at least, it could be argued that to “comply” with a jurisdictional determination by the Court may be the same as to recognize that it possesses binding force: i.e., that the United States is under an obligation to accept the judgment of the Court as to its jurisdiction in the *Nicaragua* case for all intents and purposes, and therefore to recognize and respect such a determination unless and until it chooses to exercise any of its rights under the provisions of the Statute relating to construction of the judgment under Article 60 of the Statute (or to its possible revision under Article 61). Such a view is hardly consistent with a plain reading of the opinions and attitudes expressed in the departmental statement, *supra* note 1.

<sup>22</sup> *South West Africa (Eth. v. S. Afr.; Liberia v. S. Afr.)*, Preliminary Objections, 1962 ICJ REP. 319 (Judgment of Dec. 21).

<sup>23</sup> *South West Africa (Eth. v. S. Afr.; Liberia v. S. Afr.)*, Second Phase, 1966 ICJ REP. 6 (Judgment of July 18).

<sup>24</sup> At the time, it was said that Prime Minister Verwoerd had convened a special meeting of his cabinet to determine this issue and that the decision to appear in Court had only been reached by a majority of one vote—ironically, the same one-vote majority by which the Court itself ultimately rejected the case of the applicants some 6 years later (in that instance the one vote being the double “casting vote” of President Sir Percy Spender, exercised pursuant to Article 55, paragraph 2 of the Statute).

As it was, South Africa launched a huge legal team and engaged in an enormous legal effort to marshal every conceivable argument, first as to the jurisdiction of the Court and then as to the merits of the case. On the jurisdictional arguments, South Africa filed its substantial, and lengthy, volume of "Preliminary Objections" in 1962. Following the more slender "Observations" of Ethiopia and Liberia, there was an extensive oral hearing on the numerous jurisdictional issues. On each of these issues South Africa lost, by a slight margin; it of course stands to reason that, since jurisdiction was founded by the applicants on the compromissory clause contained in Article 7 of the League of Nations Mandate, as carried forward and made applicable to the present Court by operation of Article 37 of the Statute,<sup>25</sup> had South Africa as respondent prevailed on any single one of its jurisdictional objections, it would have prevailed overall.<sup>26</sup>

But South Africa did not prevail, and the Court held in 1962 that it had jurisdiction to hear the case. It would have been at this stage that South Africa could have entertained the same thoughts, and reached the same conclusions, that the United States did in January 1985 in the context of the *Nicaragua* case; but it did not. Perhaps encouraged by the strong joint dissenting opinion of Judges Sir Gerald Fitzmaurice and Sir Percy Spender, perhaps on sound legal principle, South Africa did not do what the United States has just done, and withdraw from the case, saying, "This decision is erroneous as a matter of law and is based on a misreading and distortion of the evidence and precedent."<sup>27</sup>

To the contrary: what South Africa did do was to republish all the arguments advanced by it in the preliminary objections phase, and to add to them and embellish them with a detailed criticism of the Court's 1962 Judgment! What had been the volume entitled "Preliminary Objections" of the Republic of South Africa in 1962 thus became volume 2 to the Counter-Memorial of South Africa on the merits: the former volume was reedited, and somewhat expanded, to include an exhaustive and specific paragraph-by-paragraph critique of the Court's Judgment on Preliminary Objections!<sup>28</sup>

<sup>25</sup> By which, without regard to Article 36, South Africa was obviously bound as a signatory of the UN Charter, of which the Statute formed an "integral part" under Article 92.

<sup>26</sup> For example, had South Africa been able to prevail on any single one of its following points, the jurisdictional chain would have been broken and the Court would have been obliged to decline jurisdiction in the case: that the mandate was not a "treaty or convention"; that even if it was, it was no longer "in force"; that neither Ethiopia nor Liberia could be considered as "other members of the League of Nations" within the meaning of the mandate's compromissory clause, since there could be no "members" of a dissolved organization or because the organization itself no longer existed; that even if there was such a dispute, recourse to the Court had not been preceded by any negotiations so as to satisfy the precondition of the clause that such dispute be one that "could not be settled by negotiation"; and, finally—and most tellingly in view of the final outcome of the Second Phase in 1966—that there was no "dispute" susceptible of being brought before the Court within the meaning of the compromissory clause or admissible in the context of the mandate and the Court.

<sup>27</sup> Departmental statement, *supra* note 1, 24 ILM at 247, 79 AJIL at 440.

<sup>28</sup> See and compare: ICJ Pleadings (I South West Africa) 212 (Preliminary Objections of the Republic of South Africa); 2 *id.* at 1 (Counter-Memorial of the Republic of South Africa).

In the event, this persistence was rewarded: by death, disability and disqualification,<sup>29</sup> the membership of the Court sitting on the case was reduced from 15 judges to 12: counting the 2 judges *ad hoc*, the voting was therefore based on 14, which permitted the 7-7 tie that was broken by the President (by his casting vote under Article 55, paragraph 2 of the Statute) in favor of South Africa, which prevailed in having the entire case rejected in 1966 by the Court on what was in effect a jurisdictional issue that had been decided the other way in 1962.

Without in any sense suggesting that any equivalent ill fortune befall the present Court, this writer believes that it would have been more prudent for the United States, in 1985, to persist in its own defense, including particularly on the sufficiency of the evidence and the burden of proof—aspects of the “fourth ground of inadmissibility” discussed by the Court in paragraphs 99–101 of the *Nicaragua* Judgment. This would be a question “related to the merits” that could not have finally been disposed of by the earlier Judgment.

At least these arguments *could have been made*—and made, indeed, in the context of the arguments and evidence to be produced by Nicaragua on the merits of the case. As to each element of proof, it could have been argued that for one reason or another it was inappropriate or impossible for the Court to reach a decision or to base a decision upon it. Each witness could have been examined from top to bottom, to attempt to disprove the accuracy of the testimony and the bias of the recollection, and to attempt to illustrate at each turning point in the case that this dispute was not ripe for decision—or was not a dispute as to which the Court was capable of functioning in accordance with its Statute. The scope of the qualification of each and every expert (if experts there were) could have been drawn into question; the suitability of the subject matter of such expertise, for judicial determination, could have been questioned.

Moreover, the actual written pleadings could have replicated in substance the treatment accorded by South Africa to its own written pleadings from the preliminary objections stage in 1962. Rather than a conclusory and unreasoned series of assertions such as the departmental statement, which is no more than an aggressive political statement with little legal content,<sup>30</sup>

<sup>29</sup> Judge Badawi died during the oral proceedings, in August 1965; Judge Bustamante y Rivero was unable to participate because of ill health; and Judge Sir Muhammad Zafrulla Khan had agreed not to sit in view of his earlier acceptance of designation as judge *ad hoc* for Ethiopia and Liberia (even though he had never actually served in that capacity: see S. ROSENNE, *supra* note 6, at 197).

<sup>30</sup> For example, consider the inadequacy of its assertion that “[a]llowing Nicaragua to sue where it could not be sued was a violation of the Court’s basic principle of reciprocity, which necessarily underlies our own consent to the Court’s compulsory jurisdiction” (departmental statement, *supra* note 1, 24 ILM at 247, 79 AJIL at 440), which appears to have been made either without recognizing, or without heeding, the statement made in the *Nicaragua* Judgment to virtually the opposite effect:

Besides, the Court would remark that if proceedings had been instituted against Nicaragua at any time in these recent years, and it had sought to deny that, by the operation of Article 36, paragraph 5, it had recognized the compulsory jurisdiction of the Court, the Court would probably have rejected that argument.

the United States might have considered rearguing the substance of the jurisdictional claims by an energetic legal brief treating the question of sufficiency of the evidence in a further and different context from that argued as to "admissibility" in 1984, primarily aimed at establishing the inadequacy (or unsuitability) of the available evidence in support of Nicaragua's factual claims. Such a brief could, for example, have been constructed much along the lines of the "Preliminary Objections" originally filed by the United States in 1984, and would also have contained substantial development along the lines of the analysis contained in the "Observations" on the Court's Judgment of November 26, 1984, which accompanied the departmental statement.<sup>31</sup>

And—had the United States then lost the case on the merits—it would still have been in a position to assert that the Court in any event lacked jurisdiction from the beginning and that its decision was both "erroneous as a matter of law and . . . based on a misreading and distortion of the evidence and precedent."<sup>32</sup> The United States could—and should—have taken a leaf out of South Africa's book and continued to fight a tough fight; adequate precautions could obviously have been taken to "preserve all rights" relating to any inferences to be drawn from the continued appearance of the United States, and these rights would indeed not have been altered by the same type of extensive reargument and critical comment, addressed to the jurisdiction of the Court, as that in which South Africa engaged in 1964.

In the *South West Africa Cases*, the South African Government gambled, twice, and ultimately won. It was not predictable in 1964 or 1965 that the Court would ultimately reject the applicants' claims on a preliminary ground. It is interesting to speculate about the odds that the South African legal team would have given as to the likelihood of their ultimate success on a jurisdictional question; in a disguised form at the merits stage, after they had lost it at the preliminary objections phase. Even though the unanimity of the admissibility determination by the *Nicaragua* Court obviously means that that particular argument could not be reproduced as such with any serious hope of its acceptance—a factor not present in 1966—there are nevertheless many ways of attacking the problem, and there can be no fully reasonable *legal* explanation for the United States Government's over-hasty decision merely to ignore the Court and to participate no further in the case. In the judgment of this writer, therefore, the United States has lost a clear opportunity to continue a litigation in which it might, or in which it still may, have succeeded in one way or another.

#### TACTICAL EVALUATION

Indeed, one wonders whether these types of consideration were coolly and thoughtfully canvassed before the decision was taken "not to participate in any further proceedings in connection with this case." The inference is almost inescapable that the decision was made by politicians and not by international lawyers. Such a decision appears to ignore basic litigation com-

<sup>31</sup> *Supra* note 2.

<sup>32</sup> Departmental statement, *supra* note 1, 24 ILM at 247, 79 AJIL at 440.

mon sense; as Winston Churchill said to the boys at Harrow in a speech during the Battle of Britain: "Never, never, never, *never* give in!"

If there had been a substantive or procedural advantage to "giving in" now, one could agree that the January 18 withdrawal—in the short term—might have been a prudent and intelligent step. One is constrained to conclude, however, for several of the reasons advanced in this Note, that such a step was about as well considered as the last-minute attempt in April 1984 to withdraw, with ostensibly immediate effect, Central American questions from the Court's jurisdiction by filing the "1984 notification" on the eve of the institution of proceedings by Nicaragua.<sup>33</sup>

Even leaving aside questions of evaluation—was such a step "well considered" or not?—it is helpful to apply to the official U.S. response to this case, both in April 1984 and in January 1985, a variant of the test of reasonableness that was suggested, and applied, to the November decision in the *Nicaragua* case by Thomas Franck in his recent Editorial Comment in this *Journal*.<sup>34</sup> The variant can be formulated as follows: Is the situation presented by the *Nicaragua* case, in the context of the Statute and the Rules of Court and our obligations under the United Nations Charter, such that it is patently unreasonable to contemplate any solution *other than* termination of U.S. participation in the proceedings and withdrawal from the case? In the view of this writer, the answer is a clear and resounding no. In fact, it goes the other way: it was patently unreasonable for the United States *to have done* what it did. It is hard, if not impossible, to imagine any reason why, as a litigation matter, it was to the advantage of the United States to withdraw after the jurisdictional decision. It republishes the inferences drawn from the "1984 declaration" that these steps were in essence a confession and avoidance—a plea of guilty conscience—as to the propriety of U.S. actions in Nicaragua under international law. Why else quit the Court, which only 4 years earlier had been used in the *Hostages* case by the United States, with such great success, to uphold international law and acceptable standards of international conduct?<sup>35</sup>

#### STRATEGIC IMPLICATIONS

What are the longer term implications? It is not necessary to distort a reading of the departmental statement to understand that the present ad-

<sup>33</sup> Indeed, if the United States had been as certain as it later was to contend in the departmental statement that there had been no acceptance of the jurisdiction of the Court by Nicaragua, or that the dispute in question was inadmissible or inappropriate for the Court to determine, why then any need for the precipitate and ill-considered hastiness of the so-called 1984 notification deposited with the Secretary-General of the United Nations on Apr. 6, 1984? (See 1984 ICJ REP. at 415-21, paras. 52-66.) In the light of this inconsistency, it is all the more curious that the decision to withdraw from the merits phase was taken.

<sup>34</sup> "The appropriate standard for such review is the same as might be fashioned by any appellate tribunal: Are the findings of the ICJ so patently unreasonable . . . as to permit no other conclusion than that they reflect the willful anti-American bias of the judges?" Franck, *supra* note 3, at 382.

<sup>35</sup> This, of course, had been a proceeding brought by application under treaty compromissory clauses, and not by special agreement as suggested in the departmental statement, *supra* note 1, 24 ILM at 249, 79 AJIL at 441.



ministration now appears to hold no present or future intention of complying with a decision of the Court on the merits of the *Nicaragua* case—except, of course, in the event of an unexpected decision in favor of the United States.<sup>36</sup> To hold otherwise would be a painful naiveté.

Here it must be recalled that Article 94 of the Charter—which has never been fully invoked in any case—contains the explicit undertaking in its paragraph 1 that “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” Leaving aside any question of Security Council enforcement under paragraph 2 of Article 94,<sup>37</sup> it is interesting to focus sharply on the wording of paragraph 1. There can be no question that the undertaking of compliance contained therein is a treaty obligation at the highest level. There is no lack of clarity in the provision; it is crystal clear. Indeed, it was referred to specifically by the Court in paragraph 101 of the *Nicaragua* decision itself.

The January 1985 withdrawal of the United States nonetheless appears to be an anticipatory repudiation of this Charter obligation. It is difficult to read the departmental statement in any serious manner other than that of advance notice that the United States does not and will not consider itself bound by the final judgment of the Court, under either Article 59 of the Statute or Article 94 of the Charter.

<sup>36</sup> In this event, how comfortable will the Department of State then find its statement (*id.*): how can the position of the United States then be rehabilitated so as to “benefit” from such a judgment by the Court? Indeed, it would present a classic paradox:

- (1) The United States has stated that the Court lacks jurisdiction and competence to consider the case, and that the case is a misuse of the Court for political purposes.
- (2) If a judgment is rendered favorable to the United States, it cannot be a good judgment, and must then be bad.
- (3) The United States can therefore no longer even rely on a favorable judgment.

The United States has therefore apparently succeeded in repudiating in advance any conceivable benefit that might—on an outside chance—accrue to it by a favorable Court decision on the merits (for whatever reason). This is a true “no win” position, where part of the guaranteed loss has been deliberately, although possibly without much foresight, created by the loser itself.

<sup>37</sup> Article 94, paragraph 2 provides:

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

This raises the specter of an interesting but awkward precedent: a permanent member of the Security Council would be seeking to record its negative vote on an issue where the violation of the Charter obligation is unequivocal and the member is in effect voting as a judge in its own case. See J. ELKIND, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* 187, 206 (1984); see also Fitzmaurice, *The Problem of the ‘Non-Appearing’ Defendant Government*, 51 BRIT. Y.B. INT’L L. 89, 100 (1980):

What then lies behind an attitude that in effect maintains *a priori* that it is by the *ipse dixit* of [the defendant or respondent] State, and not by the decision of the Court, that the latter’s competence to hear and determine the case is to be settled; and in consequence that any assumption of jurisdiction by the Court, and subsequent judgment on the merits (envisaged as adverse), will not be recognized as binding?

It is hard to recall any occasion, over the past 40 years, on which the United States has adopted a position in international affairs that so openly appears to constitute anticipatory repudiation or denial of a Charter obligation.<sup>38</sup> As Thomas Franck has written, this withdrawal represents a profound development in the attitude of the present administration toward the United Nations and its organ, the International Court.<sup>39</sup> "Why should we be the last ones to play by the rules, the Reagan administration seems to be asking, long after they have been abandoned by everyone else?"<sup>40</sup> One's answer depends, one must assume, on one's personal philosophical beliefs—not partisan political views, but considered premises and values that each one of us sets upon individual lives and collective policy. "If one no longer plays by the rules, then there are no longer any rules," says the Philosopher; "and, if there are no longer any rules, then all these structures are a sham and a delusion and might just as well be abandoned." Indeed, the Philosopher adds, "If it is the case that there are no longer any rules—or any rules to play by—then all the conclusions now being advanced about multilateral international institutions and their rules *ought* to be jettisoned."

This is of course a vicious circularity: if one rejects the rules as unworthy to play by, the system itself is otiose and no longer entitled to respect. Moreover, if the structure itself can no longer command respect, then the rules which it imposes are no longer worthy of compliance. Quite apart from this fatal paradox, there is a deeper problem: Do we play by rules that we believe are worthy of obedience by all states at all times, or do we play with our own rules in accordance with the tactical advantages flowing now at this time and now at that? Is our world view then to be represented by wholly utilitarian principles: the United Nations only worthy to the extent that it serves our purpose, and the International Court entitled to our respect only if it decides in our favor?

Surely as a question of *realpolitik*, it is obvious to everyone that we must follow our national interest. It is the view of this writer, however, that our national interest must necessarily involve our own continuous attempt to support and impose the rule of international law both on ourselves and on all other states. Our national interest has for 40 years involved and required our leadership in and commitment to the organized international community

<sup>38</sup> One may, of course, anticipate assertions that noncompliance with a judgment of the Court in the *Nicaragua* case is somehow permitted by application of Article 51; nevertheless, the inconsistency of a refusal by the United States to comply with a judgment of the Court, and its Charter obligations, would be dramatically unprecedented.

<sup>39</sup> Franck, *supra* note 3, at 380: "In walking away from the Court, the United States thus expresses despair with its politicized, anti-Western bias, as revealed by its preliminary decisions in the *Nicaraguan* case, and with multilateral institutions and the neutral reciprocal principles by which they were intended to operate." It is ironic that this expression of despair—in particular, the departmental statement's mention of "two judges from Warsaw Pact countries"—should have already been overtaken by events in much the same way as the *South West Africa* proceedings were in 1965: Judge Morozov of the USSR having just resigned from the Court (and, it would appear, withdrawn from the *Nicaragua* case) for reasons of ill health. *N.Y. Times*, Sept. 12, 1985, at A7, col. 3.

<sup>40</sup> *Id.* at 380–81.

and the rule of international law, without tricks, devices, or the use of procedural force as has been so painfully exemplified in our experience in the *Nicaragua* case.

Isaiah Berlin began his book, *The Hedgehog and the Fox*, with the following:

There is a line among the fragments of the Greek poet Archilochus which says: "The fox knows many things, but the hedgehog knows one big thing". Scholars have differed about the correct interpretation of these dark words, which may mean no more than that the fox, for all his cunning, is defeated by the hedgehog's one defence. But, taken figuratively, the words can be made to yield a sense in which they mark one of the deepest differences which divide writers and thinkers, and, it may be, human beings in general.<sup>41</sup>

The United States and its allies in the world have long held the view of the hedgehog. We have professed belief, and have indeed believed, in the universal applicability of international law and the legal responsibilities of states for their actions in the international sphere. We have urged the applicability of this international legal order to all states and at all times, and have supported the institutions that apply it. Now, driven by local and topical concerns, we have given the inescapable appearance of having irrevocably abandoned those unitary principles, so carefully held and maintained since 1945, for the tactics and guile of the fox.

Here we should recall and take heed of the "dark words" of Archilochus, and understand that it is only by maintaining a strong and central vision of the rule of law that we can continue to survive in an international society in which it can be said that it is worth surviving, in its present state, at all.

KEITH HIGHET\*

## INTERVENTION UNDER ARTICLE 63 OF THE ICJ STATUTE IN THE PHASE OF PRELIMINARY PROCEEDINGS: THE "SALVADORAN INCIDENT"

### I. INTRODUCTION

In the December 1984 issue of this *Journal*, the readers were informed of El Salvador's Declaration of Intervention in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (hereinafter referred to as the *Nicaragua* case), dated August 15, 1984; of the observations by the parties on the Salvadoran Declaration (by Nicaragua, dated September 10; and by the United States, September 14); and of the supplementary communications by El Salvador (letters from the Agent of El Salvador to the Registrar of the Court, dated September 10 and 17, respectively); as well as of the Court's Order of October 4, 1984 (hereinafter referred to as the

<sup>41</sup> I. BERLIN, *THE HEDGEHOG AND THE FOX* 1 (1953).

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Order), by which the Salvadoran Declaration was rejected in a rather wholesale manner.<sup>1</sup>

As is known, the Court decided:

(1) by nine votes to six (Judges Ruda, Mosler, Ago, Schwebel, Sir Robert Jennings and de Lacharrière), not to hold a hearing on the Salvadoran Declaration; and

(2) by quasi unanimity (14 votes to one, that of Judge Schwebel), that the Salvadoran Declaration was "inadmissible inasmuch as it relates to the current phase of the proceedings" in the *Nicaragua* case.<sup>2</sup>

If thereby justice was done, it was certainly not "shown to have been done"—not only because the Court dispensed with a hearing, but also because the ostensible reasons for the Court's decision, given in three brief paragraphs, do not provide answers to the questions to which the operative paragraphs give rise. In fact, a reader of the Order may have good reason to regard it as on some points ambiguous, and on others evasive.

Several judges appended individual opinions to the Order, which can be grouped in three categories:

- the separate opinions of three judges (Nagendra Singh, Oda and Bedjaoui), who voted *for both* operative paragraphs of the Court's Order;
- the joint separate opinion of five judges (Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière), who voted *against* operative paragraph (i), denial of a hearing, but *for* operative paragraph (ii), inadmissibility of the Salvadoran Declaration; and
- the dissenting opinion of Judge Schwebel, who voted *against both* operative paragraphs of the Order and presented an elaborate exposé of his reasons (21 pages long, compared with 6 pages for the Order and the separate opinions, taken together).<sup>3</sup>

The dissenting opinion of Judge Schwebel should be read against the background of its introductory paragraph, where he declares that the Salvadoran Declaration

raises doubts, but for my part I am unwilling to resolve those doubts against El Salvador without affording it the opportunity of clarifying its position. Accordingly, once the Court declined to hear El Salvador, I felt obliged to vote in favour of admitting its right of intervention under Article 63 of the Statute, even though I recognize that neither the terms of its Declaration nor the law of the matter are altogether clear.<sup>4</sup>

The individual opinions appended to the Order shed some additional light on the possible reasons for the Court's decision and on the circumstances

<sup>1</sup> See Rogers, Beat & Wolf, *Application of El Salvador to Intervene in the Jurisdiction and Admissibility Phase of Nicaragua v. United States*, 78 AJIL 929 (1984).

<sup>2</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Declaration of Intervention, 1984 ICJ REP. 215, 216 (Order of Oct. 4), *quoted in id.* at 935-36; see also 24 ILM 43, 44 (1985).

<sup>3</sup> See 1984 ICJ REP. at 223 *et seq.*

<sup>4</sup> *Id.* at 223.

in which it was taken. The following observations will therefore focus mainly on these opinions. Certain points, however, still remain unclear to an outside commentator, and certain statements may even appear to contradict one another.

The "Salvadoran incident" poses several questions. One of them—namely, that of the admissibility of intervention under Article 63 of the Statute in the phase of proceedings on preliminary objections—is of a general character. Two others relate more specifically to the "Salvadoran incident" as such: namely, whether the Salvadoran Declaration conformed to what is contemplated by Article 63 and to the requirements of the Rules of Court; and whether a hearing on the Salvadoran Declaration should have been held in the circumstances of the case.

A student of the Court's jurisprudence, naturally enough, is tempted to inquire into the procedural problems in question. At the same time, he must feel uneasy while embarking upon this task, partly because the ambiguities of the published material inevitably leave a great deal of what happened *in camera* to speculation; and partly because he senses a disproportion between the procedural "niceties"—sometimes dull, at other times "amusing to the commentator"<sup>5</sup>—with which he is going to deal and the drama and dimensions of the underlying conflict in Central America. The present paper is submitted—and should be read—with these considerations in mind.

## II. THE QUESTION OF A HEARING

It may be appropriate to begin with the question that is taken up first in the operative part of the Order. The reasons given in the Court's Order do not explain why the Court decided "not to hold a hearing on the Declaration of Intervention of the Republic of El Salvador."<sup>6</sup> Paragraph 1 of the reasons, referring to the Court's Order of May 10, 1984,<sup>7</sup> by which "the Court decided *inter alia* that the written proceedings in the case should first be addressed to the question of jurisdiction of the Court . . . and of the admissibility of Nicaragua's Application,"<sup>8</sup> can hardly be construed as related to the denial of a hearing. At best, it might serve as an explanation of priorities in the conduct of the Court's business, had this been affected by the Salvadoran Declaration, which was not the case.<sup>9</sup> But since paragraph 1 also does

<sup>5</sup> In the words of Hambro, *Intervention under Article 63 of the Statute of the International Court of Justice*, 14 *COMMUNICAZIONI E STUDI* 387, 389 (1975).

<sup>6</sup> 1984 ICJ REP. at 216.

<sup>7</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Request for Provisional Measures, 1984 ICJ REP. 169, 180 (Order of May 10).

<sup>8</sup> 1984 ICJ REP. at 216 (referring to *id.*).

<sup>9</sup> Since the Declaration of Intervention of El Salvador was made on Aug. 15, 1984, it could only be acted upon—as indeed it was—after the conclusion of written proceedings on the questions of jurisdiction and admissibility. The latter had to be—and were—concluded on Aug. 17, 1984. See 1984 ICJ REP. 209 (Order by the President, May 14, fixing the time limits). Under the circumstances, there is no need to discuss the question of facultative priority of the matters relating to intervention, as envisaged in Article 84, paragraph 1 of the Rules. According

not explain the rejection of El Salvador's Declaration, one may wonder about its real purpose and meaning.

True enough, in paragraph 2 the Court finds that the Declaration, "which relates to the present phase of the proceedings, addresses itself also in effect to matters . . . which presuppose that the Court has jurisdiction . . . and that Nicaragua's Application . . . is admissible"<sup>10</sup>—i.e., that the petitioner's case goes to the merits. We shall revert to this finding later on. For now, suffice it to note that this part of the reasoning, by the same token, admits that the Declaration of El Salvador was "also" related "to the present phase of the proceedings." Consequently, paragraph 1, even if read together with paragraph 2, does not reveal the reasons behind the Court's decision not to hold a hearing on the Declaration of El Salvador.

The individual opinions appended to the Order give some indications of the possible reasons for the decision. But these indications are not quite univocal. Some of them tend to suggest that the issue at stake was whether or not the Declaration of El Salvador was opposed by Nicaragua and, consequently, whether or not the provision in Article 84, paragraph 2 of the Rules of Court applied.<sup>11</sup>

In its observations on the Declaration of El Salvador, Nicaragua declared that it had "no objection in principle to a *proper* intervention by El Salvador" (emphasis added). On the other hand, Nicaragua claimed that the Declaration was defective in many respects (and perhaps, therefore, did not meet the requirements for "a proper" intervention) and, in particular, that "Article 63 of the Statute . . . does not permit intervention for the purpose of opposing jurisdiction,"<sup>12</sup> which was the immediate purpose of El Salvador.

Judge Oda says, in his separate opinion:

If the observations by Nicaragua . . . had been interpreted, as I believe they should, as objecting to El Salvador's intervention at this stage, Article 84, paragraph 2, would have clearly applied. Yet, as I understand it, the majority of the Court did not take that view; otherwise the Court would have been obliged to hear the views of El Salvador and of the Parties. I voted against a hearing only because the Court was of the view that Nicaragua had not objected.<sup>13</sup>

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to this provision, decisions on intervention—whether under Article 62 or Article 63—are to be taken "as a matter of priority *unless* in view of the circumstances of the case the Court shall otherwise determine" (emphasis added).

<sup>10</sup> 1984 ICJ REP. at 216.

<sup>11</sup> Article 84, paragraph 2 of the Rules reads: "If . . . an objection is filed to an application for permission to intervene, or to the admissibility of a declaration of intervention, the Court shall hear the State seeking to intervene and the parties before deciding." For the Rules of Court adopted on Apr. 14, 1978, see 73 AJIL 748 (1979).

<sup>12</sup> Written observations of Nicaragua on the Declaration of Intervention of the Republic of El Salvador, Sept. 10, 1984, at 1, para. 1, and 2, para. 5, *discussed in* 78 AJIL at 933-34.

<sup>13</sup> 1984 ICJ REP. at 220. The statement by Judge Oda also shows how judges sometimes vote on matters that are the consequence of certain assumptions. In this case, Judge Oda declared that he voted against a hearing on the assumption of the majority "that Nicaragua had not objected"—thus, not on his own assumption that it had.

Judge Schwebel seems to attribute the same position to the Court in his dissenting opinion when he says: "The Court insisted on taking at full and face value what Nicaragua's letter says it says [i.e., "no objection in principle"] rather than what it plainly said. The Court thereby found it possible not to apply the mandatory terms of Article 84, paragraph 2, of its Rules."<sup>14</sup>

To an outside observer, it must have come as a surprise that the question whether the Salvadoran Declaration was objected to or not arose at all. Whatever might have been said about the avowed Nicaraguan position "in principle" towards "a proper intervention by El Salvador," it appears that Nicaragua had opposed the Declaration of El Salvador, insofar as it related to the jurisdictional phase, in the most unequivocal terms. In this respect, that opposition could not be rendered nugatory by the subsequent clarifying communications of El Salvador, in which it reiterated "its automatic right to intervene in this phase . . . of the proceedings."<sup>15</sup> It therefore seems that, had "the Court" (i.e., a majority) contemplated the possibility of Salvadoran intervention in the jurisdictional phase, the question of the applicability of Article 84, paragraph 2 of the Rules probably would not have arisen.

In fact, to a number of judges, the question of an objection to the Declaration of El Salvador seems not to have been decisive. Thus, the five who voted against operative paragraph (i) of the Order, i.e., in favor of a hearing, did not refer either to the opposition to the Declaration of El Salvador or to Article 84, paragraph 2 of the Rules. They were simply not convinced by the Salvadoran arguments and therefore voted to reject the Salvadoran Declaration (paragraph 3 of the joint separate opinion). Nevertheless, they also believed (paragraph 4) that "it would have been more in accordance with *judicial propriety* if the Court had granted a hearing to a State seeking to intervene, and had not decided only on the basis of the written communications."<sup>16</sup>

Judge Schwebel raises the argument of "judicial propriety" as well, especially since "there were questions which at least one judge of the Court wished to put to El Salvador." He recalls that in the only earlier case of a declaration of intervention under Article 63 (the *Haya de la Torre* case of 1951), the Court granted a hearing to Cuba, although it was not obliged to do so under Article 66, paragraph 2 of the Rules then in force—not even in the face of the Peruvian objection on that occasion.<sup>17</sup>

<sup>14</sup> *Id.* at 230.

<sup>15</sup> Letter of the Agent of El Salvador to the Registrar of the Court, Sept. 10, 1984, at 1, para. 1. See also his subsequent letter to the Registrar, Sept. 17, 1984, at 3, para. 7. In his separate opinion, Judge Oda declares, inter alia: "I regret that the Court did not attempt to ascertain the views of Nicaragua and the United States on these two subsequent communications from El Salvador." 1984 ICJ REP. at 220.

<sup>16</sup> 1984 ICJ REP. at 219 (emphasis added).

<sup>17</sup> *Id.* at 231. For the relevant material in the *Haya de la Torre* case (Colom./Peru), see 1951 ICJ REP. 71, 77 (Judgment of June 13); ICJ Pleadings (*Haya de la Torre*) 149–50. Article 66, paragraph 2 of the Rules of 1946 provided, inter alia: "If any objection or doubt should arise as to whether the intervention is admissible under Article 63 of the Statute, the decision shall rest with the Court."

Other considerations than the applicability of Article 84, paragraph 2 of the Rules emerge perhaps most plainly from the separate opinions of two judges who voted for both operative paragraphs of the Order. Thus, Judge Bedjaoui declares: "Once the Court reached the conclusion that the Application by El Salvador to intervene was inadmissible, to hold a hearing became logically pointless. . . ." <sup>18</sup> And Judge (now President) Nagendra Singh, referring to paragraph 2 of the Order (quoted above), writes:

I feel, therefore, that if a hearing were ever to be granted to El Salvador at the present first phase there would inevitably be arguments presented touching the merits. . . . If, therefore, El Salvador's request for a hearing had been granted at this stage, *it would have amounted to two hearings on merits.* . . . The decision of inadmissibility of El Salvador's Declaration taken by the Court before it had heard the applicant intervenor rendered the need for a hearing a mere formality. . . . <sup>19</sup>

These quotations show that the decision not to hold a hearing—at least for some judges—resulted from the decision on the inadmissibility of the Salvadoran Declaration rather than from the assumption that it was not opposed, although, as noted earlier, in their opinions both Judge Oda and Judge Schwebel refer to that very assumption as having been made by "the Court," i.e., by a majority.

The two judges also comment on the conduct of the Court's business in regard to the Declaration of El Salvador. Thus, Judge Oda notes:

It was also regrettable that the date of Monday 8 October had already been fixed for the commencement of the oral hearings between Nicaragua and the United States [on the questions of jurisdiction and admissibility], and that a communiqué was issued on 27 September to that effect, even before the Court met to deal with El Salvador's Declaration on Thursday 4 October. Thus the impression could have been gained that the Court already took it for granted that the oral hearing of El Salvador's Application would not be necessary and that its Declaration would be found inadmissible. In fact, El Salvador's request for an oral hearing at the jurisdictional stage was denied and the question of the admissibility of El Salvador's intervention at the present stage was dealt with on 4 October, after only one day's deliberations. <sup>20</sup>

Further details are found in the dissenting opinion of Judge Schwebel. He relates that on September 14, 1984, the United States, in a letter to the Registrar, took up the question of the scheduling of the *Nicaragua* case. In particular, referring to the letter of the Agent of El Salvador, dated September 10, <sup>21</sup> the U.S. letter stated that "the scheduling of further proceedings on the questions of the jurisdiction of the Court and the admissibility

<sup>18</sup> 1984 ICJ REP. at 222.

<sup>19</sup> *Id.* at 218 (emphasis added). The italicized phrase is rather conspicuous. It suggests that it was possible even before the oral proceedings on the questions of jurisdiction and admissibility (i.e., 6–7 weeks before the Court's Judgment of Nov. 26, 1984 on these questions) to forecast "two hearings on merits" in the case, that is, that the preliminary objections would be rejected and that the *Nicaragua* case would continue.

<sup>20</sup> *Id.* at 221.

<sup>21</sup> See note 15 *supra*.



of the Nicaraguan Application should be deferred until after such time as a determination has been reached by the Court on the admissibility of the Salvadoran intervention as of right.' " <sup>22</sup> In addition, Judge Schwebel points out that at the time of the issuance of its communiqué of September 27,

the Court had not met, and was not scheduled to meet until 4 October 1984, but was in receipt of a communication from the Agent of El Salvador of 24 September to the Registrar which recounted that he had been informed by the Registry that any decision the Court might take in connection with the Declaration of Intervention will be communicated to the Agents of the Parties and to the Agent of El Salvador prior to 8 October, on which date the President had fixed the opening of oral proceedings on the questions of jurisdiction and admissibility. El Salvador's communication of 24 September requested a postponement of the 8 October date, on the ground that it would be "difficult in the extreme for El Salvador adequately to prepare" to take part in those hearings, the more so since it had not yet been afforded access to the written pleadings of Nicaragua and the United States on these questions.

In these circumstances, it must have been clear to El Salvador and others who were closely following the matter that the time schedule fixed by the President and announced to the press in the terms in which it was announced<sup>23</sup> had been shaped on the assumption that El Salvador's Declaration of Intervention would be denied.<sup>24</sup>

### III. THE REJECTION OF THE SALVADORAN DECLARATION

Insofar as the rejection of the Salvadoran Declaration is concerned, the Order gives rise to the following observations.

1. First of all, the statement in operative paragraph (ii) that the Declaration is "inadmissible inasmuch as it relates to the current phase of the proceedings" might give the impression that it has not been acted upon and is still pending, "inasmuch as it relates to" the *next* phase of the proceedings. Such an impression may be reinforced by the Court's finding, in paragraph 2 of the reasons given in the Order, that the Salvadoran Declaration, "which relates to the present phase of the proceedings, addresses itself also in effect to matters . . . which presuppose that the Court has jurisdiction."<sup>25</sup>

To be sure, Judge Nagendra Singh, in his separate opinion, speaks of "the right of El Salvador to make a Declaration at the next phase of the case," which seems to indicate a rejection *in toto*; but later on the same page he expresses the opinion that the Court "does not totally reject the applicant's request but agrees to consider it at the proper and appropriate time."<sup>26</sup> An

<sup>22</sup> Quoted in 1984 ICJ REP. at 233 (Schwebel, J., dissenting).

<sup>23</sup> The communiqué in question, No. 84/28, Sept. 27, 1984, announced that the Court would open a hearing on jurisdiction and admissibility in the *Nicaragua* case on October 8. The communiqué ends as follows: "Meanwhile, El Salvador has filed a declaration of intervention within the meaning of Article 63 of the Court's Statute. . . . The Court's decision in regard to this declaration will be made known to the press in a subsequent communiqué."

<sup>24</sup> 1984 ICJ REP. at 232.

<sup>25</sup> *Id.* at 216.

<sup>26</sup> *Id.* at 218.

indication of the total rejection of the Salvadoran Declaration—i.e., even insofar as it related to its arguments on the merits—can only be found in the subsequent Judgment of the Court of November 26, 1984, on the questions of jurisdiction and admissibility. There, the Court refers to the procedure of intervention “to . . . which El Salvador has already unsuccessfully resorted in the jurisdictional phase of the proceedings, but to which it may revert in the merits phase of the case.”<sup>27</sup>

It may be in order to recall in this context the Cuban intervention in the *Haya de la Torre* case. The Court found that the Cuban Declaration of Intervention pertained not only “also,” but “almost entirely” to another phase of the case—formally, indeed, to another case (*Asylum*) already determined. “[T]o that extent,” it did “not satisfy the conditions of a genuine intervention.”<sup>28</sup>

However, at the public hearing on May 15th, 1951, the Agent of the Government of Cuba stated that the intervention was based on the fact that the Court was required to interpret a new aspect of the Havana Convention, an aspect which the Court had not been called on to consider in its Judgment of November 20th, 1950.

Reduced in this way, and operating within these limits, the intervention . . . conformed to the conditions of Article 63 of the Statute, and the Court . . . decided . . . to admit the intervention. . . .<sup>29</sup>

Thus, in *Haya de la Torre*, the Court acted on the premise that declarations of intervention were severable, and that if they contained heterogeneous elements (i.e., pertaining to different cases or different phases of the proceedings), these could be acted upon separately: the irrelevant ones dismissed, others recognized. There is no explanation in the Order why this reasoning would have been inappropriate in, or inapplicable to, the “Salvadoran incident” in the *Nicaragua* case; or why in the latter case the Court acted upon the opposite premise, i.e., that the Declaration of Intervention was not severable so that it had to be rejected *in toto* in the phase of preliminary objections.

The attempt by Fiji to intervene in the *Nuclear Tests* cases also has some relevance in this connection.<sup>30</sup> To be sure, the Applications by Fiji were not heterogeneous, but they were untimely, as, *arguendo*, was the Salvadoran Declaration in the *Nicaragua* case. Although they pertained entirely to the merits, they were filed *in limine litis*<sup>31</sup> while the proceedings in those cases

<sup>27</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392, 425 (Judgment of Nov. 26) (emphasis added).

<sup>28</sup> 1951 ICJ REP. at 77.

<sup>29</sup> *Id.* (quoted in part in another context by Judge Schwebel in his dissenting opinion, 1984 ICJ REP. at 231).

<sup>30</sup> In the present context, it is immaterial that the ground for intervention invoked in those cases was Article 62 rather than Article 63 of the Statute.

<sup>31</sup> See Application by Fiji for permission to intervene in the Nuclear Tests case (Austl. v. Fr.), ICJ Pleadings (I Nuclear Tests) 151 (Application dated May 16, 1973); the Application for the New Zealand v. France case is in 2 *id.* at 92 (May 18, 1973).

also had to be addressed first to jurisdiction and admissibility.<sup>32</sup> Nevertheless, the Court did not reject Fiji's Applications as untimely but preserved their pendency, having decided "to defer its consideration of the Application[s] . . . until it has pronounced upon the questions" of jurisdiction and admissibility.<sup>33</sup> One may wonder why the same procedure could not have been applied in the "Salvadoran incident" in the *Nicaragua* case, and why the pendency of the Salvadoran Declaration could not have been preserved inasmuch as it related to the merits—even if the Court had to find it inadmissible in the jurisdictional phase.

2. However, the main question of interest regarding the rejection of the Declaration of El Salvador is why it was rejected in the jurisdictional phase of the proceedings when, whatever else it addressed, it admittedly "also" related to matters considered in this very phase. In view of what has been said above, paragraph 2 of the reasons in the Order does not provide an answer; and paragraph 3 does not bring us closer to one. In the latter paragraph, the Court notes that El Salvador itself (as if anticipating the failure of its attempt to intervene in the jurisdictional phase or of the arguments against the Court's jurisdiction and/or the admissibility of Nicaragua's Application) reserved "the right at a later substantive phase of the case to address the interpretation and application of the conventions to which it is also a party relevant to that phase." "34

Whether this reservation was necessary is debatable. Perhaps it was intended to save the pendency of the Declaration for the merits phase in case it was rejected in the jurisdictional phase. In any event, one can hardly see anything in this reservation that per se disqualifies the Declaration of El Salvador.

In sum, a reader of the Order cannot learn from its text the specific and true reasons for the rejection of the Declaration in the jurisdictional phase. Only the individual opinions of judges bring us somewhat closer to the truth, although certain details still remain obscure. Particularly enlightening in this respect is the dissenting opinion of Judge Schwebel:

Unprecedented questions not resolved by the foregoing body of practice have arisen in the instant case. They are these:

—May intervention under Article 63 take place in the jurisdictional phase of a proceeding?

<sup>32</sup> See *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, Interim Protection, 1973 ICJ REP. 99, 106, 142 (Orders of June 22).

<sup>33</sup> See *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, Application to Intervene, 1973 ICJ REP. 320, 324 (Orders of July 12). When the Court, by its Judgments of Dec. 20, 1974, declared the *Nuclear Tests* cases moot, it also issued two Orders in which it found that, as a consequence of these Judgments, the Applications of Fiji had lapsed, and no further action on them was required. See *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, Application to Intervene, 1974 ICJ REP. 530, 535 (Orders of Dec. 20).

<sup>34</sup> 1984 ICJ REP. at 216. The phrase quoted by the Court is taken from the letter of the Agent of El Salvador, *supra* note 15, at 4, para. 5. El Salvador requested that the Court consider that letter "as a part of the Declaration in amplification of the contents thereof." *Id.* at 6, para. 10.

—If so, is such intervention confined to conventions other than the Statute of the Court and the Charter of the United Nations?

—If such intervention is not so confined, does it embrace the Statute as well as the Charter?

—If so, may intervention embrace not only the Charter and the Statute but declarations submitted under the Optional Clause of the Statute?<sup>35</sup>

And further:

A question which remains is this. Even if it is accepted that the right of intervention under Article 63 applies to the jurisdictional phase of proceedings, and even if it is accepted that it embraces the construction of the Statute and Charter as well as other conventions, should the Court have barred intervention by El Salvador at this stage on the ground that it sought to intervene on questions of admissibility rather than jurisdiction and that these questions can be properly dealt with only at the stage of the merits since they are so intertwined with the merits?<sup>36</sup>

These questions apparently indicate some of the reasons that impelled judges to vote against the Salvadoran intervention in the phase of preliminary objections. El Salvador invoked only articles of the UN Charter and the Court's Statute, as well as—parenthetically—declarations under the optional clause, as an alleged bar to continued proceedings in the *Nicaragua* case.

Moreover, certain judges may have voted against the Salvadoran Declaration for other reasons than its alleged inadmissibility, on one ground or another, in the jurisdictional phase. This appears to be the case with the five judges who appended their joint separate opinion to the Order and declared, *inter alia*:

We have voted with the majority of the Court in deciding that El Salvador's declaration of intervention is inadmissible in the present phase of the proceedings, because we have not been able to find, in El Salvador's written communications to the Court, the necessary identification of such particular provision or provisions which it considers to be in question in the jurisdictional phase of the case between Nicaragua and the United States; nor of the construction of such provision or provisions for which it contends. Furthermore, the brief references made in this regard have not convinced us that El Salvador's request is in accordance with what is contemplated by Article 63 of the Court's Statute.<sup>37</sup>

In addition, Judge Oda, who believed that the Declaration of El Salvador might have been admitted in the jurisdictional phase, apparently voted for its rejection for other reasons (*inter alia*, because it had not "been properly formulated").<sup>38</sup>

<sup>35</sup> 1984 ICJ REP. at 234.

<sup>36</sup> *Id.* at 242.

<sup>37</sup> *Id.* at 219. However, as noted earlier, the five judges believed that the Court should not have relied on written communications only and that a hearing should have been held.

<sup>38</sup> *Id.* at 221.

If the names of Judges Oda and Schwebel are added to those of the five other judges, it turns out that at least seven judges *did not* regard the intervention under Article 63 in the jurisdictional phase as inadmissible in principle.

The preceding quotations lead to the conclusion that the rather impressive majority of 14 votes to 1 to reject the Salvadoran Declaration was composed of judges with different reasons in mind. Furthermore, those who relied on the inadmissibility of intervention in the phase of preliminary objections might in turn have done so for various specific reasons, which can be inferred from the list of questions compiled by Judge Schwebel. On the other hand, those who relied on the inadequacy of the contents of the Declaration might have done so with different considerations in mind. Indeed, there might have been still other reasons not reflected in any individual opinion.

At this point, the ambiguity and evasiveness of the Order become more understandable. Any attempt at formulating a specific reason for the Court's action would most probably have caused a deep split, which had to be avoided. One gets the impression that if attempts at going into greater detail had been pushed too far, it might have been difficult to win support for any specific rationale. Under the circumstances, the Court apparently preferred to show a facade of quasi unanimity at the expense of the persuasive force of its decision.

#### IV. ADMISSIBILITY OF INTERVENTION UNDER ARTICLE 63 IN THE PHASE OF PRELIMINARY OBJECTIONS

The dissenting opinion of Judge Schwebel implies that this question must have occupied a prominent place in the Court's deliberations; and the computation in the previous section indicates that up to eight judges might have regarded any intervention at this stage as inadmissible. It is therefore striking that, except for Judge Schwebel (and Judge Oda, in a cursory and rather indirect phrase), no one discussed this problem in an individual opinion. In particular, not one of the judges who were against intervention in the phase of preliminary objections expounded his arguments on this point.

1. As far as unwillingness to admit intervention under Article 63 in the jurisdictional phase *in general* is concerned,<sup>39</sup> it can be based on the doctrinal proposition that "intervention is merely incidental to the main proceedings."<sup>40</sup> On this premise, the very idea of one incident of proceedings (intervention) being related to *another incident* (preliminary objections) may appear incon-

<sup>39</sup> There appears to be no quarrel about the inadmissibility of intervention under Article 62 in the phase of preliminary objections. On this point, see the dissenting opinion of Judge Schwebel appended to the Order, *id.* at 235.

<sup>40</sup> V. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 260 (1980) (emphasis added). However, the author draws a specific conclusion from this proposition only insofar as the inadmissibility of intervention in proceedings under Articles 60 and 61 of the Statute is concerned, but refrains from extending the conclusion to proceedings on preliminary objections. (The term "incident" is used here in the sense of the above quotation from Mani, as "incidental to the main proceedings.")

ceivable and unacceptable to a juridical mind, as incompatible with the general principles of judicial process.

It is also true that the drafters of the Statute did not think in terms of the procedural consequences of phased proceedings, although they themselves laid the groundwork for them; they related all incidents to "cases" as such, i.e., implicitly to the merits. Still, this does not mean that international jurists of the 1920s were unwilling to admit certain procedural consequences of phased proceedings in interstate litigation—they simply did not give them any thought at the inception and in the early years of the Court.<sup>41</sup> But when they did, they had to consider the possibility of an intervention under Article 63 related to another incident of proceedings. For instance, Judge Anzilotti, in one of his writings, explicitly admitted such an intervention related to counterclaims if the latter involved the interpretation of a multilateral treaty, even if the main claim was based on other grounds.<sup>42</sup>

In considering the admissibility of intervention under Article 63 in the phase of preliminary objections in interstate litigation, two points must be borne in mind.

On the one hand, an intervention of the type envisaged in Article 63 ("not a case of 'true intervention,' " in the words of Judge Hudson<sup>43</sup>) is a wholly autonomous institution of interstate litigation and an independent product of the development of the judicial method of settlement of interstate disputes. Unlike intervention under Article 62, it has no counterpart in municipal legal systems where it simply has no *ratio existendi*. This autonomous institution of interstate litigation reflects the fact that multilateral treaties, purporting to establish general patterns of conduct and/or of mutual rights and obligations of individual parties—in contradistinction to public laws of the same purport—are consensual in nature, *including treaties and treaty clauses conferring jurisdiction upon international courts*. Insofar as judicial decisions can affect the legal position of third parties, it is taken into account that these parties would be sovereign states, and that, as such, they should be given an opportunity to contribute to the judicial construction of provisions in whose creation they had directly participated. Accordingly, this author submits that the operation of Article 63 must be related to the specific conditions of the functioning of the interstate judicial system rather than deduced from what may be called general principles of procedural law, as they have developed in municipal legal systems.<sup>44</sup>

<sup>41</sup> As demonstrated, e.g., by the *Mavrommatis* case (1924), in which the Court had to improvise the handling of preliminary objections, for lack of pertinent provisions in the Rules of 1922.

<sup>42</sup> See Anzilotti, *La Riconvenzione nella procedura internazionale*, 21 RIVISTA DI DIRITTO INTERNAZIONALE 309, 316 (1929).

<sup>43</sup> M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942*, at 422 (1943).

<sup>44</sup> For a strong warning against excessive analogies between the international and municipal processes, see, e.g., A. SERENI, *PRINCIPI GENERALI DI DIRITTO E PROCESSO INTERNAZIONALE* 9-13, 50-54, 68-71 (1955). Also, Scerni observes that "dans le droit de procédure ces principes [i.e., general principles of law] ne constituent point une source de droit, la volonté de la Cour étant libre de choisir ou de créer la règle de conduite." *La Procédure de la Cour permanente de justice internationale*, 65 RECUEIL DES COURS 561, 589 (1938 III).

On the other hand, it must be remembered that jurisdictional decisions in interstate disputes are not like any other "procedural or otherwise genuinely interlocutory decisions." In the *Jurisdiction of the ICAO Council* case, the Court held, *inter alia*:

(a) Although a jurisdictional decision does not determine the "ultimate merits" of the case, it is a decision of a substantive character, inasmuch as it may decide the whole affair by bringing it to an end, if the finding is against the assumption of jurisdiction. A decision which can have that effect is of scarcely less importance than a decision on the merits. . . .

(d) Not only do issues of jurisdiction involve questions of law. . . . They may, in the context of such an entity as ICAO, create precedents affecting the position and interests of a large number of States, in a way which no ordinary procedural, interlocutory or other preliminary issue could do.<sup>45</sup>

The last passage applies, of course, not only to the jurisdiction of ICAO (which case, in fact, can be reduced to the question of the construction of Article 84 of the Chicago Convention and Article II, section 2 of the Transit Agreement<sup>46</sup>), but also to all other jurisdictional issues that may arise under any other multilateral convention.

For these reasons, intervention under Article 63 in the phase of preliminary objections is fully consistent with—indeed, inherent in—the text of the article, even if it may be at variance with the principle of municipal procedural law (which is applicable to the case of intervention under Article 62) according to which intervention, like any other incidental proceeding, is related to the merits.

In his dissenting opinion, Judge Schwebel argues:

The terms of Article 63 of the Statute are comprehensively cast: "Whenever" the construction of "a convention" is "in question . . .". There is no hint in these terms—or in their *travaux préparatoires*—that they mean other than what their plain meaning says. "Whenever"—that is, whatever time in the proceedings of a case—imports not some but all, not some phases of a case but any phase. . . .

Thus the terms of Article 63 and the Rules which the Court has adopted<sup>47</sup> in implementation of those terms both indicate that inter-

<sup>45</sup> Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pak.*), 1972 ICJ REP. 46, 56–57 (Judgment of Aug. 18). Rosenne writes in the same vein: "The question whether and to what extent the Court has jurisdiction is frequently of no less, if not more, political importance than the decision on the merits." S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 437 (1965).

<sup>46</sup> Accordingly, notifications under Article 63 were sent on that occasion. See ICJ Pleadings (*Jurisdiction of the ICAO Council*) 781 (notifications dated Mar. 28, 1972).

<sup>47</sup> Judge Schwebel sees further support for his argument in the fact that Article 82, paragraph 1 of the present Rules provides for "the opening of the oral proceedings" and not the "oral proceedings on the merits" as the usual time limit for filing declarations of intervention under Article 63. There was no corresponding provision (no time limit) in any of the earlier versions of the Rules.

vention under Article 63 in the jurisdictional phase of a case is permitted. The sense of Article 63 implies no less. Why should intervention at the jurisdictional phase of a case not be admitted? There are multilateral conventions that, in whole or in part, relate to jurisdictional questions. Their construction by the Court in a case between two States can affect the legal position of a third State under such conventions no less than it can affect their position under other conventions, or parts of other conventions, whose clauses are substantive rather than jurisdictional. Take, for example, the controversies that have come before the Court more than once over the force and effect of the General Act of 26 September 1928 for the Pacific Settlement of International Disputes. If one State maintains that that Act remains in force and is a basis of the Court's jurisdiction, and another contests those contentions, why should not a third State party to the Act be able to intervene under Article 63 at the jurisdictional stage of the proceedings to submit a statement of the construction of the relevant provisions of that Act for which it contends?<sup>48</sup>

Judge Schwebel further notes that the Court and the Registrar have consistently acted on the premise that intervention under Article 63 in the phase of preliminary objections is admissible. This finding is apparently based on the practice of notification, envisaged in Article 63, paragraph 1—insofar as such notifications indicate that the proceedings in question may be susceptible to intervention under Article 63.<sup>49</sup> Indeed, notifications relating *specifically to the phase of preliminary objections* have been sent on several occasions throughout the history of the Court. Thus:

- In connection with the two Applications concerning *Appeals from Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (1932), as well as in *Pajzs, Csáky, and Esterházy* (1935) and *Phosphates in Morocco* (1936), notifications under Article 63 were sent not only when the Applications invoking multilateral conventions were filed (by Czechoslovakia, Hungary and Italy, respectively),<sup>50</sup> but also *anew, separately*, when the respective respondents (Hungary, Yugoslavia and France) filed their preliminary objections also invoking multilateral treaties.<sup>51</sup>

- In the *Corfu Channel* case (1947), notifications, with explicit references to Article 63, were sent specifically in connection with the preliminary objection of Albania challenging the British interpretation of Article 36 of the Statute and Articles 25, 32 and 36 of the UN

<sup>48</sup> 1984 ICJ REP. at 234–35.

<sup>49</sup> On the whole, the practice of sending notifications under Article 63, paragraph 1 has always been somewhat confused. Hambro says that this practice always “puzzled” him—even during his own term of office as Registrar of the Court. See Hambro, *supra* note 5, at 387.

<sup>50</sup> See PCIJ, ser. C, No. 68, at 243 and 256 (*Appeals from Judgments*); *id.*, No. 80, at 1370–71 (*Pajzs, Csáky and Esterházy*); *id.*, No. 85, at 1349 (*Phosphates in Morocco*).

<sup>51</sup> See PCIJ, ser. C, No. 68, at 264–65; *id.*, No. 80, at 1381–82; and *id.*, No. 85, at 1356, respectively.



Charter,<sup>52</sup> although no notifications were sent pursuant to the filing of the British Application, which invoked the same articles.<sup>53</sup>

- In the *Anglo-Iranian Oil Co.* case (1952), notifications under Article 63, with explicit reference to that article, were sent to all member states of the United Nations when Iran filed a preliminary objection invoking, inter alia, Article 2, paragraph 7 of the UN Charter,<sup>54</sup> although the British Application per se raised no question of a notification under Article 63, as it did not bring any multilateral treaty "in question."<sup>55</sup>

- Finally, in the *Nuclear Tests* cases, notifications under Article 63 were sent because "le demandeur a invoqué l'Acte général . . . , fait à Genève le 26 septembre 1928, pour fonder la compétence de la Cour."<sup>56</sup>

In view of this practice, it appears that the admissibility of intervention under Article 63 in the jurisdictional phase of a proceeding should not have been doubted.

2. As noted earlier, Judge Schwebel, in his dissenting opinion, discussed whether intervention under Article 63 in the jurisdictional phase is admissible not only in general, but also *in particular*—when the construction of the UN Charter and/or of the Court's Statute is "in question." Apparently, no specific argument tending to exclude just the *UN Charter* from the scope of applicability of Article 63 has been advanced; and Judge Schwebel, for his part, argues as follows:

Since the provisions and purpose of Article 63 suggest no reason why a State should not be permitted to intervene over the construction of the United Nations Charter, the burden of showing that intervention to construe articles of the Charter is impermissible rests on those who so maintain. *No arguments in support of such an exceptional conclusion have come to light.* . . .

The pertinent provision of Article 63 is unqualified: whenever the construction of "a convention" is in question, the right to intervene arises. The United Nations Charter is not only a convention, it is the most important existing component of the body of conventional international law.<sup>57</sup>

<sup>52</sup> See Preliminary objection of Albania, ICJ Pleadings (2 Corfu Channel) 9 *et seq.*; Notification, 5 *id.* at 149. See also Corfu Channel case (UK v. Alb.), Preliminary Objection, 1948 ICJ REP. 15, 23 (Judgment of Mar. 28). The *Corfu Channel* case is cited in the dissenting opinion of Judge Schwebel in another connection. See 1984 ICJ REP. at 237.

<sup>53</sup> See Application of the United Kingdom, ICJ Pleadings (1 Corfu Channel) 8–9.

<sup>54</sup> See Preliminary objection of Iran, ICJ Pleadings (Anglo-Iranian Oil Co.) 281 *et seq.*; Notification, *id.* at 741. See also Anglo-Iranian Oil Co. case (UK v. Iran), Preliminary Objections, 1952 ICJ REP. 93, 95 (Judgment of July 22). This case is also extensively quoted in the dissenting opinion of Judge Schwebel in another context. See 1984 ICJ REP. at 238.

<sup>55</sup> See ICJ Pleadings (Anglo-Iranian Oil Co.) 8 *et seq.*

<sup>56</sup> See *id.* (2 Nuclear Tests) 384 (emphasis added).

<sup>57</sup> 1984 ICJ REP. at 236 (emphasis added).

After quoting the notifications under Article 63 sent in the *Corfu Channel* and *Anglo-Iranian Oil Co.* cases because the respective respondents, in their preliminary objections, invoked articles of the UN Charter as a bar to the Court's jurisdiction, Judge Schwebel concludes: "This constitutes a renewed demonstration of the understanding of the Court that Article 63 both permits intervention at the jurisdictional stage and permits it on questions of construction of the United Nations Charter."<sup>58</sup>

Judge Schwebel also reveals that

[b]y an administrative decision of this Court taken early in its history under the Presidency of Judge Basdevant [which must have happened shortly after the notifications in the *Anglo-Iranian Oil Co.* case<sup>59</sup>] and affirmed by President Winiarski, the Registrar does not routinely send notifications to States parties when the United Nations Charter is cited before the Court, particularly because, under the terms of Article 40, paragraph 3, of the Statute, the Registrar, when a case is brought before the Court, shall forthwith communicate the application to the Members of the United Nations and any other States entitled to appear before the Court. It was accordingly decided that, since States which could intervene under Article 63 have already had the application communicated to them under Article 40, there is no need to send them a new communication in such cases even though their attention had not been expressly drawn to Article 63.<sup>60</sup>

Now, the appropriateness of the administrative decision referred to by Judge Schwebel may be debatable. Notifications under Article 40 cannot replace notifications under Article 63 or render the latter superfluous, for the simple reason that the involvement of a multilateral treaty in a case and the ensuing right of intervention under Article 63 do not always result from an application or a special agreement but sometimes only from some subsequent piece of procedure. The judges could not have been unaware of that. This is just what happened in the *Anglo-Iranian Oil Co.* case, which apparently prompted the above-mentioned administrative decision and in which a multilateral treaty (the UN Charter) was brought "in question" in the preliminary objections of Iran, no earlier than 8 months after the notification of the British Application under Article 40.

Of course, the absence of notifications under Article 63 does not per se deprive states of the chance to intervene under that article.<sup>61</sup> In this sense, Judge Schwebel is right when he says that the Court "has never modified" the position it took in the *Corfu Channel* case with respect to the admissibility

<sup>58</sup> *Id.* at 238. See also notes 52 and 54 *supra*.

<sup>59</sup> The notifications in the *Anglo-Iranian Oil Co.* case, note 54 *supra*, were sent out on Feb. 21, 1952; Judge Basdevant's term as President ended on Apr. 5, 1952.

<sup>60</sup> 1984 ICJ REP. at 233-34.

<sup>61</sup> Since 1936, the Rules have explicitly provided that a "State which is a party to the convention in question and to which the notification . . . has not been sent, may in the same way file with the Registry a declaration of intention to intervene under Article 63 of the Statute." Art. 66, para. 2 of the Rules of 1936. Likewise, Art. 66, para. 1 of the Rules of 1946; Art. 71, para. 1 of the Rules of 1972; and Art. 82, para. 3 of the Rules of 1973, now in force.

of intervention over the construction of the UN Charter in the jurisdictional phase of a proceeding.<sup>62</sup> Still, it appears that the aforementioned administrative decision is just another symptom of the Court's tendency—which can also be observed in other contexts—not to encourage intervention, whether under Article 62 or Article 63, whether aimed at the construction of the UN Charter or some other convention, and whether in the jurisdictional phase of a proceeding or otherwise.

3. Judge Schwebel further notes in his dissenting opinion that, while “no arguments . . . have come to light” in support of the proposition that the UN Charter should be regarded as not covered by the operation of Article 63, distinctions have been raised between the Charter and the Court's Statute that purport to demonstrate the inapplicability of Article 63 to the *Statute*. The arguments to this effect, cited by Judge Schwebel, can be reduced to the following:

(1) Everything the Court does in every case engages the provisions of the Statute, and this fact alone cannot furnish grounds for intervention under Article 63 on questions concerning the Court's functions.<sup>63</sup> This argument is apparently meant to apply no matter what phase of proceedings is involved.

(2) As a consequence of (1), treating the Statute as a convention within the meaning of Article 63 would require notification under that article in every case, and there would be no purpose in Article 40. But “Article 63 assumes exceptional notification in some cases, not notification in every case as under Article 40.”<sup>64</sup>

(3) The Registrar has not “routinely” sent notifications under Article 63 whenever articles of the Statute were invoked in a case.<sup>65</sup>

(4) Treating the Statute as a convention within the meaning of Article 63 would entitle third states parties to the Statute to intervene whenever there was a dispute over the Court's jurisdiction, “and the result could be a cascade of interventions.”<sup>66</sup> This argument apparently derives from the view that intervention under Article 63 in the phase of preliminary objections is inadmissible as a matter of principle.

The basic position of Judge Schwebel on this matter is as follows: “If a State has the right to intervene under Article 63 of the Statute on a question of construction of the Charter, . . . it equally has the right to intervene on the question of construction of that Statute which is an integral part of the Charter.”<sup>67</sup>

To each specific argument to the contrary, cited above, Judge Schwebel offers a reply. To the first, he responds that “Article 63 is not concerned with the *application* of provisions of a convention, including the Statute, but

<sup>62</sup> 1984 ICJ REP. at 237.

<sup>63</sup> *Id.* at 239.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 240.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* According to Article 92 of the UN Charter, the Court's “Statute . . . forms an integral part of the present Charter.”

their *construction, i.e. interpretation*, and questions of interpretation of the Statute are not posed by its routine application.”<sup>68</sup>

Moreover, it is implicit in Article 63 that the construction of a convention must be “in question” as between parties to a case—not as between the judges (within the Court) or as between the Court and a party that may be dissatisfied with the Court’s construction. However, the Statute is normally both “construed” and “applied” by the Court alone; in practice, this reduces the room for application of Article 63 to interpretation of the Statute. Accordingly, Judge Schwebel continues:

If a provision of the Statute is not incidentally engaged or mentioned, but is *at issue in a case between two States*, then there is no reason why a third State cannot intervene over the construction of that provision. And, apart from Article 36, other provisions of the Statute are not frequently at issue in a case.<sup>69</sup>

Indeed, from a purely formal and theoretical point of view, other articles of the Statute may also be “in question” (“at issue”) as between parties to a case. But Article 36 occupies a special position in this respect as the only article of the Statute that explicitly deals with “the event of a dispute” between parties. Consequently, the construction of the Statute is most likely to be “at issue” precisely in the jurisdictional phase of a proceeding. Moreover, such an “issue” would not concern so much the functions of the Court (as apparently claimed by some judges)<sup>70</sup> as the scope of the parties’ consent to the Court’s jurisdiction.

Judge Schwebel’s answer to the second argument above flows from his position on the first, namely:

[T]he purpose of notification under Article 40 is simply to inform States that an application has been made and of what the terms of that application are. The purpose of notification under Article 63 is to alert States to the fact that the construction of a convention to which they are party may be at issue in the case before the Court. Such construction may be pleaded not only in the application but otherwise, as in preliminary objections. Treating the Statute as a convention within the meaning of Article 63 does not require that the exceptional notification of Article 63 shall be made to the States parties to the Statute in every case. It only requires that notification be made . . . in those exceptional cases where the *pleadings in a case* reveal that the construction of a provision of the Statute is at issue [i.e., again, as between parties].<sup>71</sup>

<sup>68</sup> 1984 ICJ REP. at 239 (emphasis added). Readers will note that, in contradistinction to the usual dispute settlement clauses in treaties, which envisage disputes concerning their “interpretation and application,” Article 63 is concerned only with the “construction” (i.e., interpretation) of a convention.

<sup>69</sup> 1984 ICJ REP. at 239. When the construction of a convention is “in question” (“at issue”) is another question that could form the subject of a separate study. Hambro excludes extreme interpretations of the phrase, but offers no definite positive solution instead. See Hambro, *supra* note 5, at 392–93.

<sup>70</sup> See the argument cited in the text at note 63 *supra*.

<sup>71</sup> 1984 ICJ REP. at 240 (emphasis added).

The third argument, on the lack of notifications under Article 63 relating to the construction of the Statute, is regarded by Judge Schwebel as "true, but . . . not probative, for the reason that the Registrar does not send notices under Article 63 in respect of construction of the Charter, a practice which appears to have included the Statute."<sup>72</sup> Indeed, so far as this author could ascertain, notifications under Article 63 have never been sent in respect of construction of the Statute—not even before they were discontinued in respect of construction of the Charter. However, the following detail relating to the notifications in the *Corfu Channel* case can be noted. In that case, both Article 36 of the Statute and Articles 25, 32 and 36 of the UN Charter were invoked,<sup>73</sup> but the notification mentioned only Articles 32 and 36 of the Charter. On the other hand, it was addressed not only to the member states of the United Nations, but also to other states entitled to appear before the Court<sup>74</sup>—an indirect indication that the reference to the Statute had been acted upon de facto as well.

Now, the Registrar is known to be rather restrictive in sending notifications under Article 63, and in *doubtful cases* notifications are not sent.<sup>75</sup> Thus, even if the lack of notifications were fully consistent, it might be taken only as an indication that the matter was doubtful—but no more. Vacillations, such as the one demonstrated in the *Corfu Channel* case, further weaken the probative value of the absence of notifications. Moreover, the absence of a notification seems not to preclude per se either the possibility of making a declaration of intervention or the admissibility of a declaration if made. The Rules of Court have appeared explicitly to reflect this point of view since 1936, probably in recognition of a certain confusion about notification under Article 63.<sup>76</sup> Under the circumstances, lack of notifications as an argument

<sup>72</sup> *Id.*

<sup>73</sup> See Application of the United Kingdom, ICJ Pleadings (1 *Corfu Channel*) 8–9; Preliminary objection of Albania, 2 *id.* at 9 *et seq.*

<sup>74</sup> See 5 *id.* at 149. In this connection, it may be recalled that in the *Anglo-Iranian Oil Co.* case, in which only Article 2, paragraph 7 of the Charter was invoked, notification was sent only to the member states of the United Nations. See note 54 *supra*.

<sup>75</sup> See, e.g., the statement of the Registrar of the PCIJ (Å. Hammarskjöld) during the elaboration of the Rules of 1936. 1936 PCIJ, ser. D, Add. 3, at 310; also Hambro, *supra* note 5, at 393, 396.

<sup>76</sup> See note 61 *supra*. It must be admitted, however, that the Rules are open to interpretation on this point. It is arguable, for instance, that the reference to "a State that . . . has not received the notification" (Art. 82, para. 3 of the present Rules; analogously in the earlier versions) points to situations in which individual states may have been omitted, but not situations when notification has not been sent at all; and that if the latter had also been contemplated, this would have been specified in the Rules. This author submits, however, that the better interpretation is that the quoted phrase covers both types of situations. This follows clearly from the reply of the Registrar to the Polish envoy to The Hague, in which the former confirmed the right of intervention under Article 63 in connection with the *Free Zones* case, although the parties to the Treaty of Versailles had earlier been specifically informed by the Registrar that notifications under Article 63 would not be sent. See 1929 PCIJ, ser. C, No. 17-I, vol. IV, at 2400, 2423–27 and 2429–30. Also, in the *North Sea Continental Shelf Cases*, in which notifications were not sent, no less than 14 states parties to the Continental Shelf Convention of 1958 requested access to the pleadings (see ICJ Pleadings (2 *North Sea Continental Shelf*) 378) on the apparent understanding that they might wish to intervene.

against the admissibility of intervention in respect of construction of the Statute is unconvincing and can hardly outweigh other arguments, of a substantive nature, to the contrary—of course, on the understanding that just the provisions of the Statute are “in question” in the phase of preliminary objections. Otherwise, the whole problem does not exist. Doubts of this very nature perhaps explain, at least partly, the lack of notifications in respect of construction of the Statute.

As for the fourth and last argument, Judge Schwebel observes that jurisdictional disputes often concern “not the terms of the Statute but of other conventions or of declarations under the Optional Clause.”<sup>77</sup> Indeed, one wonders whether it is not “other conventions or . . . declarations” rather than the terms of the Statute that as a rule are “at issue” in jurisdictional disputes. For the Statute, in principle, does not directly confer jurisdiction on the Court but only indicates the ways in which this can be done: (1) by “treaties and conventions” according to paragraph 1 of Article 36 (and Article 37); or (2) by declarations, under paragraphs 2–5 of the same article. Jurisdictional disputes normally focus upon the construction of these means. Only very exceptionally can one imagine a situation such as actually arose in the *Nicaragua* case when the United States directly brought “in question” the phrase “the same obligation” in Article 36, paragraph 2, claiming that the construction of this phrase was applicable to the duration and terminability of declarations under that provision (the so-called pre-seisin reciprocity).<sup>78</sup>

However that may be, Judge Schwebel observes that the apprehension that every jurisdictional dispute would open the door to a cascade of interventions, should the Statute be regarded as a convention in the meaning of Article 63, is unwarranted. Since the Judgment in the *Corfu Channel* case (1948), which

surely is open to the interpretation that the Statute is a convention within the meaning of Article 63 . . . , only one State (Cuba) has, before the instant case, sought to intervene under Article 63 at all, and El Salvador is the first to seek to intervene at a jurisdictional stage in construction of the Statute.<sup>79</sup>

4. Another special case of possible intervention in the jurisdictional phase under Article 63 concerns the construction of declarations under the optional clause. In his separate opinion in the *Norwegian Loans* case, Judge Lauterpacht commented on the admissibility and validity of the so-called automatic reservation in the French Declaration under the optional clause, and expressed the opinion that the position taken by the Court on this subject might affect other states. Accordingly, Judge Lauterpacht believed, “It would have been

<sup>77</sup> 1984 ICJ REP. at 240.

<sup>78</sup> See Counter-Memorial of the United States of America (*Nicar. v. U.S.*) 162–65 (submitted to the Court Aug. 17, 1984). The Court, in its Judgment of Nov. 26, 1984 on the preliminary objections, did not endorse the U.S. interpretation. See 1984 ICJ REP. at 419–21, paras. 62–64.

<sup>79</sup> 1984 ICJ REP. at 240 (Order of Oct. 4) (Schwebel, J., dissenting).

preferable if, in accordance with Article 63 of the Statute, the Governments which had made a Declaration in these terms had been given an opportunity to intervene.”<sup>80</sup> This opinion, which he repeated in the *Interhandel* case in connection with the United States Declaration under the optional clause,<sup>81</sup> clearly indicates that Judge Lauterpacht regarded intervention in respect of the construction of declarations under the optional clause as falling within the purview of Article 63.

Having quoted Judge Lauterpacht, Judge Schwebel goes on to point out, in his dissenting opinion to the Order, that there is “room for another opinion, based upon the fact that the declarations . . . are not conventions. May it be maintained that Article 63—which expressly relates to the construction of ‘a convention’—may be extended to include declarations made pursuant to a convention? That appears to be questionable.”<sup>82</sup> Judge Schwebel refrained, however, from elaborating on this point, since the legal character of declarations under the optional clause was at that moment at issue in the pending proceedings on jurisdiction and admissibility in the *Nicaragua* case.<sup>83</sup> Indeed, in its Counter-Memorial, the United States elaborated at some length on the proposition that “Declarations are *Sui Generis*: They Are Not Treaties and Are Not Governed by the Law of Treaties.”<sup>84</sup>

There appears to be little quarrel about the proposition that declarations under the optional clause are not treaties, and that they establish a consensual regime *sui generis*, whatever may be more specifically meant by this term. At the same time, it appears that, in the words of Judge Lauterpacht, “It is irrelevant for the purpose of the view here outlined whether the instrument of acceptance of obligations of the Optional Clause is a treaty or some other mode of creating obligations.”<sup>85</sup> What seems to be relevant in the present context is the following.

As noted earlier, states may accept the Court’s obligatory jurisdiction by two means: (1) treaties and conventions, and/or (2) declarations under the optional clause. The two categories of instruments, obviously, are different in nature. In particular, in contradistinction to treaties, declarations under the optional clause have no independent legal existence; they do not “exist except by virtue of the Statute.”<sup>86</sup> For that matter, it is just this factor, *inter alia*, that gives them their multilateral aspect as “subsidiaries” to the Statute<sup>87</sup> (another factor is their binding force with respect to many states).

Yet, although different in nature, these two categories of legal instruments constitute two sources of the Court’s jurisdiction, which—as the Court in-

<sup>80</sup> Case of Certain Norwegian Loans (*Fr. v. Nor.*), 1957 ICJ REP. 9, 63–64 (Judgment of July 6) (Lauterpacht, J., sep. op.).

<sup>81</sup> *Interhandel* Case (*Switz. v. U.S.*), Interim Measures of Protection, 1957 ICJ REP. 105, 120 (Order of Oct. 24) (Lauterpacht, J., sep. op.).

<sup>82</sup> 1984 ICJ REP. at 242.

<sup>83</sup> *Id.*

<sup>84</sup> U.S. Counter-Memorial, *supra* note 78, at 135–50.

<sup>85</sup> Case of Certain Norwegian Loans, 1957 ICJ REP. at 48 (Lauterpacht, J., sep. op.).

<sup>86</sup> *Id.* at 46.

<sup>87</sup> The term used by Judge Hudson. See M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 388 (1934).

dictated in *Electricity Company of Sofia & Bulgaria*—are separate and independent from one another even when invoked in the same case.<sup>88</sup> In this respect, they are equivalent. Moreover, on the same occasion the Court evidently recognized their *equivalence* in the matter of immediate relevance to these considerations, namely, *as regards the effects of their construction*. The Court said: "Only if both these sets of objections [i.e., related to both sources of its jurisdiction] are alike held to be well-founded will the Court decline to entertain the case."<sup>89</sup>

This equivalence of the effects of construction is related not only to bilateral treaties (a bilateral treaty was at stake in the quoted case) but to multilateral treaties as well, by virtue of the multilateral elements that, side by side with other elements of a unilateral or bilateral nature, characterize declarations under the optional clause.<sup>90</sup> For it can hardly be contested that the construction of a jurisdictional link based on a declaration under the optional clause can affect the legal position of third states as much as the construction of such a link based on a provision in a multilateral treaty. Thus, for instance, the Court's decision recognizing the binding force of the disputed Declaration of Nicaragua affects the legal position vis-à-vis Nicaragua of all other states that made declarations under the optional clause. This is so even though El Salvador, while seeking intervention, emphasized the strict conformity of its Declaration of Intervention with Article 63; and, "thus," it did not propose to address the question whether the Nicaraguan Declaration had binding force under the optional clause,<sup>91</sup> on the apparent understanding that intervention in respect of the construction of that Declaration might be regarded as not being in conformity with Article 63. Indeed, in the very next sentence, El Salvador declared that it might "address the effectiveness of the declaration of the United States of 6 April 1984, under Article 36, paragraph 2," admitting that "the Court's determination of the question might affect the reservation of El Salvador to the Court's jurisdiction."<sup>92</sup>

It seems to be at variance with basic considerations of equity and logic that states should be allowed to intervene under Article 63 on the construction of a jurisdictional link established by the means envisaged in paragraph 1, but not by the means envisaged in paragraph 2 of the same article, since the function and purpose of both provisions, as well as the effects of their construction by the Court, are exactly the same.

Accordingly, this author submits that intervention under Article 63 in respect of the construction of declarations under the optional clause should

<sup>88</sup> See 1939 PCIJ, ser. A/B, No. 77, at 80 (Judgment on Jurisdiction of Apr. 4).

<sup>89</sup> *Id.* at 76.

<sup>90</sup> See the joint dissenting opinion of Judges Spender and Fitzmaurice in the South West Africa Cases (Eth. v. S. Afr.), Preliminary Objections, 1962 ICJ REP. 319, 475 (Judgment of Dec. 21); I. SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION* 147 (1965); Waldock, *Decline of the Optional Clause*, 32 BRIT. Y.B. INT'L L. 244, 254 (1955-56).

<sup>91</sup> Letter of the Agent of El Salvador, *supra* note 15, at 4, para. 3.

<sup>92</sup> *Id.*



be regarded as admissible by way of analogy, because of the equivalence of the two independent sources of the Court's jurisdiction—at least insofar as the effects of their construction by the Court (a crucial point in the present context) are concerned. This interpretation remains valid even if intervention in respect of construction of the Statute in general is otherwise regarded as inadmissible, and if, consequently, the admissibility of intervention in respect of declarations under the optional clause could no longer be explained by their appurtenance to the Statute (a method of "contracting-in," to use the words of Judge McNair<sup>93</sup>) under its Article 36, paragraph 2.

The admissibility of analogies from the law of treaties regarding particular aspects of declarations under the optional clause was recently confirmed by the Court when, in considering their termination and withdrawal, it held that they "should be treated, by analogy, according to the law of treaties."<sup>94</sup> On the same occasion, Judge Jennings pointed out that "[d]oubtless some parts of the law of treaties may be applied by useful analogy" to these declarations.<sup>95</sup> The idea is also reflected in the literature.<sup>96</sup>

That the word "convention" may be applied by analogy to declarations under the optional clause as possible grounds for intervention under Article 63 in the jurisdictional phase of proceedings is especially justified if seen against the background of the history of the Statute. It must be borne in mind that the present Article 63 was formulated when the draft Statute did not envisage an optional clause or declarations thereunder. Neither the records of the League of Nations of 1920, nor those of the Committee of Jurists of 1929, nor, finally, those of the UN Committee of Jurists of April 1945 or of the San Francisco Conference reveal any indication that the possible effects upon Article 63 of the introduction of optional jurisdiction were ever given a thought, or that the wording of Article 63 was retained deliberately to exclude declarations under the optional clause.

5. The last question to be examined is that of the admissibility of declarations of intervention which are addressed to the admissibility of main applications rather than to the Court's jurisdiction (as was the case with the Salvadoran Declaration). The Court, even if it has jurisdiction, may find an application inadmissible because of its subject matter (for instance, if it finds that subject matter nonjusticiable). Questions of admissibility can often be properly dealt with only in the phase on the merits. Judge Schwebel takes up this question in his dissenting opinion, and his position is as follows:

—While the main thrust of the contentions of El Salvador does appear to relate essentially to questions of admissibility rather than jurisdiction, those are questions which are before the Court at the stage of

<sup>93</sup> See *Anglo-Iranian Oil Co.*, 1952 ICJ REP. at 116 (McNair, J., sep. op.).

<sup>94</sup> *Nicaragua v. United States*, 1984 ICJ REP. at 420 (Judgment of Nov. 26).

<sup>95</sup> *Id.* at 546 (Jennings, J., sep. op.).

<sup>96</sup> See, e.g., Crawford, who notes that "the Court has not applied to declarations under the Optional Clause rules of treaty interpretation as such; rather, such principles are extended by analogy, or similar principles are generated independently of their application to treaties." *The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court*, 50 BRIT. Y.B. INT'L L. 63, 77 (1979).

the proceedings on which it is now about to embark. In the hearings which led up to the issuance of the Court's Order of 10 May 1984, the United States had advanced arguments which purported to demonstrate that Nicaragua's claims were inadmissible, essentially on the ground that other organs and modalities of the international system are to be charged, and have in this case been charged, with resolution of a political dispute involving the current use of armed force.<sup>97</sup> Nicaragua advanced arguments to meet these contentions of the United States. Having heard these arguments, the Court, in its Order of 10 May, decided:

"that the written proceedings shall first be addressed to the questions of the jurisdiction of the Court . . . and of the admissibility of the Application" (. . . *I.C.J. Reports 1984*, p. 187).

—In response to the Court's Order, the Memorial submitted by Nicaragua and the Counter-Memorial submitted by the United States extensively address questions of admissibility.

—In seeking to intervene, El Salvador seeks the construction of provisions of the United Nations Charter and other conventions which relate to some of the very questions of admissibility argued by the Parties to the case.

—Thus to deny El Salvador the right to intervene on the ground that it will argue issues of admissibility is at odds with the Order of the Court and the presumed course of the impending hearings.<sup>98</sup>

Moreover, the determination of questions of admissibility need not necessarily await the proceedings on the merits, as was just demonstrated, in particular, in the *Nicaragua* case in which the Court, in its Judgment on preliminary objections of November 26, 1984, already found unanimously that Nicaragua's Application was admissible.<sup>99</sup> Whether questions of admissibility will be determined in the phase of preliminary objections or joined to the merits cannot be decided, at least from the formal point of view, before these questions have been fully pleaded; and a state seeking to intervene in the phase of preliminary objections apparently can contribute to the decision by its observations at that stage. There is nothing in the Statute or the Rules that precludes intervention in the phase of preliminary objections, addressed to questions of admissibility.

6. The comments in this section may sound like an engaged pleading for massive recourse to intervention under Article 63 no matter what the occasion or when it may arise, and for an extreme liberality in admitting such an intervention. They are not. As a matter of fact, this author is convinced that—for reasons whose explanation would go far beyond the framework of this paper—the institution of intervention, be it under Article 62 or Article 63, has a very limited *ratio existendi* in interstate litigation. Both the

<sup>97</sup> In its Judgment on preliminary objections of Nov. 26, 1984, the Court found, *inter alia*: "It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States." 1984 ICJ REP. at 434, para. 94.

<sup>98</sup> 1984 ICJ REP. at 243 (Order of Oct. 4).

<sup>99</sup> See the Judgment of Nov. 26, 1984 ICJ REP. at 442 (para. 2 of the operative part of the Judgment).

restraint of states in resorting to intervention (even if perhaps somewhat relaxed during the last dozen years) and the restraint of the Court in admitting intervention when sought seem to confirm this proposition. The presence of the articles on intervention in the Statute can be explained partly by a more or less automatic borrowing from municipal legal process, partly by ordinary prudence. For it cannot be excluded a priori—as the *Wimbledon* and *Haya da la Torre* cases demonstrated—that intervention—even if “reduced,” as it was in both cases—can be justified and appropriate. It is only with considerations of ordinary prudence in mind that this author believes that one should not, by an excessively restrictive interpretation of the Statute and application of rather formalistic criteria, exclude a priori the possibility of intervention in whole categories of cases where intervention otherwise—be it only very occasionally—can be justified by common sense and reasons of substance.

#### V. THE CONTENTS OF THE SALVADORAN DECLARATION OF INTERVENTION

It may be useful to begin this section with an outline of the conditions of intervention under Article 63 and of their history. A third state “has *the right* to intervene in the proceedings” (emphasis added) “whenever the construction of a convention” to which it also is a party “is in question” in a case. The Advisory Committee of Jurists (1920) supplied its draft article in question with the following commentary:

[T]here is one case in which *the Court cannot refuse* a request to be allowed to intervene; that is in questions concerning the interpretation of a Convention in which States, other than the contesting parties, have taken part; each of these is to have the right to intervene in the case.<sup>100</sup>

Hence the concept of intervention “as of right,” of “automatic right to intervene,”<sup>101</sup> of “an absolute right to intervene”<sup>102</sup>—in a sense also reflected in the Rules of Court, which provide for a “declaration” of intervention under Article 63 as distinct from an “application for permission to intervene” under Article 62.<sup>103</sup>

The Rules of 1922, 1926 and 1931 did not add any clarification or precision to the wording of Article 63; and against this background, the idea seems to have prevailed that the right of intervention under Article 63 was

<sup>100</sup> Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux and Report, June 16–July 12, 1920, at 746 (1920) (emphasis added), *quoted in* observations of the United States on the Declaration of Intervention of El Salvador, letter of the Agent of the United States to the Registrar, Sept. 14, 1984, at 2 *in fine*.

<sup>101</sup> See letter of the Agent of El Salvador, *supra* note 15.

<sup>102</sup> See U.S. observations, *supra* note 100.

<sup>103</sup> This terminology has been used in the Rules since 1936. Article 60, paragraph 1 of the Rules of 1922 provided simply: “Any State desiring to intervene, under the terms of Article 63 of the Statute, shall inform the Registrar in writing. . . .” The Rules of 1926 and of 1931 contained no reference whatsoever to the form in which states had to signify their intention to intervene.

totally unqualified, that it was a "right, which the mere fact of their participating in a convention conferred upon States,"<sup>104</sup> and that a state wishing to intervene under Article 63 "n'a qu'à le faire savoir au greffe."<sup>105</sup>

At the same time, there was a growing awareness that Article 63 is open to interpretation and that, consequently, not necessarily every declaration of intervention must be regarded as automatically and unreservedly satisfying the conditions in that article. Accordingly, the Rules of 1936 recognized, in Article 66, paragraph 3, the possibility—retained in all subsequent versions of the Rules—that declarations of intervention might be scrutinized, both pursuant to objections by parties and by the Court *proprio motu*: "If any objection or doubt should arise as to whether the intervention is admissible under Article 63 of the Statute, the decision shall rest with the Court." This provision clearly reflected the understanding that states wishing to intervene under Article 63 are not the sole masters of their intentions, and that intervention under the article cannot be taken for granted. This was manifested in practice the first time a declaration was ever filed under Article 63, when the Court considerably limited the scope of intervention of Cuba in the *Haya de la Torre* case. On this occasion, the Court further specified (and thereby tightened) the conditions of intervention under Article 63 by holding "that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings";<sup>106</sup> i.e., not just to the "convention . . . in question"—at large.

At this point, Judge Fitzmaurice, in one of his writings, summarized the law governing intervention under Article 63 as follows:

Although intervention under this Article is *as of right*, provided the conditions stated in it are fulfilled, it is naturally for the Court to decide whether they are actually satisfied or not. . . . Given that these conditions are present, the Court is bound to admit the intervention, and has no discretionary power in the matter, as it would seem it must have under Article 62. . . .<sup>107</sup>

Theoretically, the difference between the Court's powers under Article 62 and those under Article 63 is considerable. In the former case, the Court assesses not only the conformity of an application with the conditions of the Statute but also the appropriateness of intervention even though the conditions may be fulfilled; in the latter case, the Court assesses only the conformity of the declaration with the statutory provisions. Yet, in practice, the difference may be very thin since the element of essentially unrestricted

<sup>104</sup> 1926 PCIJ, ser. D, No. 2, Addendum, at 159 (statement by President Huber, July 23, 1926, during the elaboration of the Rules of 1926). The same view was reiterated during the preparation of the Rules of 1936, in the Report of the Third Commission (of the Court), Mar. 14, 1934. See 1934 PCIJ, ser. D, No. 2, Add. 3, at 779.

<sup>105</sup> A. BUSTAMANTE, LA COUR PERMANENTE DE JUSTICE INTERNATIONALE 227 (trans. from Span. 1925). Likewise President Sir Cecil Hurst, in his statement of Feb. 21, 1935, during the elaboration of the Rules of 1936. See 1935 PCIJ, ser. D, No. 2, Add. 3, at 309.

<sup>106</sup> *Haya de la Torre*, 1951 ICJ REP. at 76 (emphasis added).

<sup>107</sup> Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4*, 34 BRIT. Y.B. INT'L L. 1, 127 (1958) (emphasis added), quoted in U.S. observations, *supra* note 100.

judicial assessment is always present. Indeed, the proximity of the two situations is reflected in Article 84, paragraph 1 of the Rules of 1978, now in force, which in one breath provides, rather flatly: "The Court shall decide whether an application for permission to intervene under Article 62 of the Statute should be granted, and whether an intervention under Article 63 of the Statute is admissible. . . ." Accordingly, concludes Rosenne, "[t]he effect of Article 84 as a whole is that an intervention only becomes effective with the decision of the Court under paragraph 1."<sup>108</sup>

This author submits that all the scholarly writings on intervention under Article 63 of the last three decades, which reiterate the "right to intervene" in seemingly categorical and unconditional terms (e.g., "la Cour n'a pas à se prononcer,"<sup>109</sup> "L'intervention . . . est de droit et ne peut être refusée par la Cour"<sup>110</sup>), indeed presuppose compliance with certain conditions.<sup>111</sup> A telling example in this respect is provided by Judge Elias, who wrote in 1983:

Intervention under Article 63 is open to all those States that can show that the construction of an international convention, to which they are all parties, is involved; no other requirement need be fulfilled before an intervening State can participate in such proceedings before the Court. Intervention under Article 63 is, on this basis, automatic for the State intending to intervene.<sup>112</sup>

Only a year later, Judge Elias voted against the admissibility of the Salvadoran Declaration. Thus, his statement—on the whole rather categorically in favor of intervention under Article 63—apparently did not exclude the possibility of negative conclusions as to the admissibility of declarations of intervention.

Indeed, the Rules of 1978 further tightened the conditions of intervention under Article 63 by introducing, in Article 82, paragraph 2, certain specific requirements concerning the contents of declarations of intervention. Two of these requirements are of direct relevance here: namely, "(b) identification of the particular provisions of the convention the construction of which is considered to be in question; [and] (c) a statement of the construction of those provisions for which it contends." In addition to the requirement of substantive correspondence of a declaration with "the subject-matter of the pending proceedings," which the Court laid down in the *Haya de la Torre* case, the above provisions seem to require the formal correspondence of a

<sup>108</sup> S. ROSENNE, *PROCEDURE IN THE INTERNATIONAL COURT* 180 (1983).

<sup>109</sup> L. DELBEZ, *LES PRINCIPES GÉNÉRAUX DU CONTENTIEUX INTERNATIONAL* 136 (1962).

<sup>110</sup> G. GUYOMAR, *COMMENTAIRE DU RÈGLEMENT DE LA COUR INTERNATIONALE DE JUSTICE* 535 (1973).

<sup>111</sup> Thus, e.g., Mani, on the one hand, declares that "[a]ll that a State needs to do in exercise of its right of intervention [under Article 63] is to inform the Registry through a declaration that it intends to intervene" (V. MANI, *supra* note 40, at 84-85); but in the footnote he adds, with reference to Article 84, paragraph 1 of the Rules: "Yet, it is for the Court to decide on the admissibility of such intervention" (*id.* at 347 n.169).

<sup>112</sup> T. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 93 (1983), *quoted in* U.S. observations, *supra* note 100, at 4, in support of the Salvadoran Declaration of Intervention.

declaration of intervention with specific treaty provisions brought "in question" in a case.

The Declaration of El Salvador must be viewed in light of all the conditions and requirements that have accumulated since 1936;<sup>113</sup> but the line of reasoning in the Declaration is not easy to grasp. As noted earlier, both the judges who appended a joint separate opinion to the Order and Judge Oda expressed misgivings about the contents of the Declaration,<sup>114</sup> and Judge Schwebel admitted that it "raises doubts."<sup>115</sup> His own construction of the Salvadoran Declaration is as follows:

El Salvador sought to intervene in the jurisdictional phase of the proceedings . . . to argue that a proper construction of Article 36 of the Statute of the Court, and of Articles 39, 51 and 52 of the Charter, debar the Court from addressing the merits of Nicaragua's claims. Its argument appears to be more addressed to the admissibility of the claims of Nicaragua than to the Court's jurisdiction over them; the principal thrust of El Salvador's contentions is that the resolution of an ongoing armed conflict is remitted to the political organs of the international system (in this case, the United Nations and regional arrangements<sup>116</sup>) rather than to the Court.

. . . [I]t also relies on the terms of Article 36 of the Statute and on adherences to the Court's compulsory jurisdiction . . . , as well as on provisions of the OAS Charter and two other inter-American conventions. The intentment of El Salvador's argument in these respects requires clarification, . . . which could have been sought by putting questions to El Salvador, either in the course of an oral hearing or otherwise.

In the absence of that hearing, and because the Court declined to put such questions to El Salvador . . . , it is not possible to be certain of the meaning of El Salvador's contentions. But as far as I can make them out, at least as they relate to the United Nations Charter, the Statute and the Optional Clause, they appear to be as follows.

El Salvador maintains that Nicaragua's substantive case against the United States, which is essentially based on four multilateral treaties to which El Salvador equally is party, bears upon exercise of El Salvador's right of collective self-defence together with the United States. El Salvador observes that it has not consented (by the terms of its adherence to the Optional Clause which excludes disputes relating to individual or collective actions taken in self-defence), and does not consent, to a case being brought before the Court by Nicaragua against

<sup>113</sup> The Declaration of El Salvador has already been summarized and quoted in this *Journal*. See 78 AJIL at 930-32. It is reprinted in its entirety in 24 ILM 38 (1985). Accordingly, it will be described or quoted here only to the minimum extent necessary.

<sup>114</sup> See the quotations in the text at notes 37 and 38 *supra*.

<sup>115</sup> See the quotation in the text at note 4 *supra*.

<sup>116</sup> In its Judgment of Nov. 26, 1984 on preliminary objections in the *Nicaragua* case, the Court did "not consider that the Contadora process, whatever its merits, can properly be regarded as a 'regional arrangement' for the purpose of Chapter VIII of the Charter." 1984 ICJ REP. at 440, para. 107.

it. El Salvador thus argues that Nicaragua's case against the United States is equally inadmissible and beyond the Court's jurisdiction.<sup>117</sup>

There is no corresponding exposé of arguments on the part of that great majority of judges who voted against the admissibility of the Salvadoran Declaration. The five judges who appended the joint separate opinion expressed their position in three sentences of a rather general character, and Judge Oda only cursorily intimated that the Declaration could have been formulated otherwise ("properly").<sup>118</sup> Under the circumstances, observations on the subject by an outside student can only be very loose and cannot claim any relationship to the actual reasoning of the judges.

In its Application, Nicaragua claimed that the United States had violated (leaving aside alleged violations of rules of customary international law):<sup>119</sup>

- Article 2(4) of the United Nations Charter;
- Articles 18 and 20 of the Charter of the Organization of American States;
- Article 8 of the Convention on Rights and Duties of States;<sup>120</sup>
- Article I, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife.<sup>121</sup>

As to the basis of the Court's jurisdiction, Nicaragua submitted that "[b]oth the United States and Nicaragua have accepted the compulsory jurisdiction of the Court under Article 36 of the Statute of the Court."<sup>122</sup>

At this point, only the above-cited provisions of multilateral treaties could possibly have been regarded as those "in question"; and only one of them related to the phase of preliminary objections. Possibly out of uncertainty over the admissibility of intervention in respect of construction of the Statute and of declarations under the optional clause, El Salvador did not invoke the construction of this very provision as a ground for its Declaration. Con-

<sup>117</sup> 1984 ICJ REP. at 226-27 (Order of Oct. 4) (Schwebel, J., dissenting).

<sup>118</sup> See notes 114 and 115 *supra*.

<sup>119</sup> Application Instituting Proceedings (Nicar. v. U.S.) 16 (submitted to the Court on Apr. 9, 1984).

<sup>120</sup> An inter-American Convention, signed at Montevideo on Dec. 26, 1933. Article 8 provides: "No state has the right to intervene in the internal or external affairs of another." For the text, see 6 INTERNATIONAL LEGISLATION 620, 623 (M. Hudson ed. 1937).

<sup>121</sup> An inter-American Convention, signed at Havana on Feb. 20, 1928. Article I provides:

The contracting States bind themselves to observe the following rules with regard to civil strife in another of them. . . . Third: To forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.

For the text, see 4 *id.* at 2416, 2418.

<sup>122</sup> Application, *supra* note 119, at 10. Later, Nicaragua also invoked, as an additional basis of the Court's jurisdiction, the Treaty of Friendship, Commerce and Navigation of Jan. 21, 1956 between the United States and Nicaragua, which, however, as a bilateral treaty is extraneous to the subject matter of this paper. See Memorial of Nicaragua (Nicar. v. U.S.) 85-90, 95 (submitted to the Court on June 30, 1984).

sequently, it did not state which construction it advocated.<sup>123</sup> On the other hand, the reference by El Salvador to its participation in the four other multilateral treaties invoked in the Nicaraguan Application<sup>124</sup> could be questioned as not relevant in the phase of preliminary objections, since these treaties, especially the particular provisions invoked by Nicaragua, related to the merits and had no bearing on the questions of jurisdiction and/or admissibility in the case. The greater part of the Salvadoran Declaration was designed to show that El Salvador was the object of subversive activities by Nicaragua and, thus, that action together with the United States in the exercise of the right of collective self-defense was necessary. The intent was to prove that the Court was not competent in view of the nature of the conflict. Yet this part of the Declaration was also not related to any specific provision at issue at that time.

On September 10, 1984, El Salvador filed a complementary document in which it invoked Article 36 of the Statute, as well as Articles 39, 51 and 52 of the Charter, as, in its opinion, a bar to the continuance of the proceedings, if properly construed. The document went on:

El Salvador will contend that those provisions should be construed to deny the jurisdiction of the Court to consider and apply the conventional principles relied on by Nicaragua to an ongoing armed conflict such as is presently underway in Central America, and will contend that the Application of Nicaragua is inadmissible by a process of similar reasoning. El Salvador will particularly contend that this construction is appropriate with respect to Articles 39, 51 and 52 of the Charter, *inter alia*, and to Article 36 of the Statute, because:

—these provisions, properly construed, contemplate that the application of the principles on which Nicaragua relies to an ongoing armed conflict is a political, not a judicial question, and that the exclusive appropriate fora for consideration of the search for peace in ongoing armed conflict is through the established processes of the political organs of the international system;

—these conventional provisions properly construed deny jurisdiction to the Court with respect to an ongoing armed conflict, make clear that nothing in the Charter including the actions of the Court under the Statute shall affect the right of individual or collective self defense and make clear that such armed conflict is not a legal dispute within the competence of the Court; and that those provisions properly construed make the States of Central America indispensable parties to any proceeding concerned with the ongoing Central American conflict, and since these states are not parties to the proceeding it cannot go forward.<sup>125</sup>

<sup>123</sup> See Declaration of Intervention (Article 63 of the Statute) of the Republic of El Salvador (Nicar. v. U.S.) 12, 14 (submitted to the Court on Aug. 15, 1984), also referred to *supra* note 113, where mention is made only of the fact that Article 36 was invoked by Nicaragua as the basis of the Court's jurisdiction.

<sup>124</sup> *Id.* at 14.

<sup>125</sup> Letter of the Agent of El Salvador, *supra* note 15, at 2-3, para. 1.



In this context, an essential difference between the procedural positions of a respondent and of a prospective intervener under Article 63 should be noted. A respondent pleading to the Court's jurisdiction or to the admissibility of an application is free to use *whatever arguments* that he believes are likely to convince the Court. A prospective intervener under Article 63, who may otherwise wish to plead the same cause, does not enjoy the same liberty of argumentation. His argumentation is expected to be strictly focused on the specific provisions of multilateral treaties that bear on the preliminary questions at issue (i.e., that are relied on by any of the parties), and on their contended construction.

To be sure, the articles of the Charter invoked by the Agent of El Salvador in the letter quoted above were not at issue insofar as the Application of Nicaragua and its Memorial on jurisdiction and admissibility were concerned. In the meantime, however, on August 17, 1984, the United States had filed its Counter-Memorial on these questions, and in Part IV, *The Inadmissibility of the Application*, relied heavily on just those articles.<sup>126</sup> Whatever the position of the Court might have been towards arguments based on these articles (and we know now that the arguments relating to inadmissibility were unanimously rejected),<sup>127</sup> it nevertheless appears that they were "in question"; and that, consequently, the Salvadoran Declaration no longer lacked an attachment to the specific provisions at issue in the pending proceedings. However, in view of the explicit reference by Judge Oda to the formulation of the "initial Declaration" of El Salvador,<sup>128</sup> the question arises to what extent its weak points were regarded as cured by the subsequent letter from the Agent of El Salvador, since that letter described itself as having to be "considered . . . as a part of the Declaration in amplification of the contents thereof."<sup>129</sup> The five judges who appended the joint separate opinion, and whose position was based on all the communications of El Salvador to the Court, still were "not . . . able to find . . . the necessary identification of such particular provision or provisions which it considers to be in question in the jurisdictional phase of the case . . . ; nor of the construction of such provision or provisions for which it contends."<sup>130</sup> The "brief references made in this regard" did not convince the judges, though they did believe that the Court should not have relied on written communications alone.

The rejection of the Salvadoran Declaration gives rise to some misgivings. Perhaps not so much the fact itself (for the admissibility of intervention under Article 63 is always subject to assessment and decision by the Court and can never be taken for granted) as the manner in which it was done: in terse terms, without revealing the line of reasoning in the relevant paragraphs

<sup>126</sup> See Counter-Memorial submitted by the United States of America (Nicar. v. U.S.) 177-90 (Aug. 17, 1984).

<sup>127</sup> See the Judgment of Nov. 26, 1984 ICJ REP. at 442; see also notes 97 and 116 *supra*.

<sup>128</sup> See 1984 ICJ REP. at 221.

<sup>129</sup> Letter of the Agent of El Salvador, *supra* note 15, at 6, para. 10 (emphasis added).

<sup>130</sup> 1984 ICJ REP. at 219 (quoted in full in text at note 37 *supra*).

of the Order and, above all, without even giving the declarant state a hearing. Amplification of the rationale would also have been commendable in view of the novelty of the legal issues involved and in order to refute the extreme interpretations of the concept of "intervention as of right" that seem to continue to live in certain opinions of international jurists. The circumstances surrounding the Court's decision might reinforce the suspicions—noticeable in other aspects of the *Nicaragua* case—of politicization of judicial proceedings and anti-Western bias.<sup>131</sup> All this is unfortunate.

The main legal issue, however, the admissibility of intervention under Article 63 in the phase of proceedings on preliminary objections (possibly including the question of certain limitations in this respect), remains open. In the words of Judge Oda:

Had El Salvador's initial Declaration been properly formulated, had Nicaragua's observations been properly interpreted, and had the procedures of the Court been properly pursued, El Salvador's Declaration might well have been the first case of intervention under Article 63 of the Statute to be considered by the Court at a jurisdictional phase of a case.<sup>132</sup>

JERZY SZTUCKI\*

#### IN MEMORIAM: PROFESSOR TED L. STEIN (1952–1985)

Ted L. Stein, a leading contributor to this *Journal*, died on June 12, 1985. His untimely death in a fishing accident cut short the career of one of the most promising young scholars in our profession. Despite his youth, he had a long and productive involvement in international law. He was a 1974 graduate of the Woodrow Wilson School of Public and International Affairs at Princeton University and a 1977 graduate of the Harvard Law School. At Harvard he was Articles Editor of the *Harvard International Law Journal*. After clerking for the Honorable Irving L. Goldberg of the Fifth Circuit Court of Appeals, he served as an attorney in the State Department's Office of the Legal Adviser. While in that office, he played an important role in shaping the U.S. arguments in the *Iranian Hostages* case. In 1980 he joined the law faculty of the University of Washington where he was recently approved for promotion to the rank of professor. In the fall of 1983, he visited at the University of Michigan School of Law. This past spring, he was elected to the Executive Council of the American Society of International Law.

During the course of his 5 short years in academia, he produced scholarship that catapulted him into the front ranks of the field. He published two articles

<sup>131</sup> On this aspect of the *Nicaragua* case, see the Editorial Comment by Thomas M. Franck, *Icy Day at the ICJ*, 79 AJIL 379 (1985); see also Observations by the U.S. Department of State on the ICJ's Nov. 26, 1984 Judgment, *id.* at 423.

<sup>132</sup> 1984 ICJ REP. at 221.

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in this *Journal*, *Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt* (76 AJIL 499 (1982)), and *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal* (78 AJIL 1 (1984)). The former earned him the 1983 Francis Deák Prize from the ASIL for the best scholarship published in the *Journal* in the previous year by a young author. As an active member of the ASIL, he appeared twice on the program of the Annual Meeting. He spoke in 1982 on the "ICJ Decision in the Libya-Tunisia Continental Shelf Case" (76 ASIL Proc. 161 (1982)), and in 1984 on the "Decisions of the U.S.-Iran Claims Tribunal."

His well-written and argued scholarship documents his deep understanding of, and dedication to, international law. All four of these pieces focus on international dispute settlement tribunals. They evince a sophisticated appreciation of the role such tribunals play in the international legal system. At the time of his death, he had a paper pending publication in the *Harvard International Law Journal*, and he was working on a book with Professor William T. Burke of the University of Washington. Had he lived to pursue his scholarship further, his contributions to the field of international law would have been enormous.

In addition to his devotion to scholarship, Ted Stein took a strong interest in his colleagues and students. He was known as an excellent teacher at Washington and played a leadership role at that law school. At the same time, he was a kind and gentle person who was liked by all. In his memory there has been established at the University of Washington School of Law the Ted L. Stein Memorial Fund.

Those of us who knew him well found him to be a most valuable person with whom to discuss matters of international law. His mastery of the field and his eagerness to "brainstorm" with others made him a special colleague. It is difficult to comprehend the extent of the loss suffered by his early and tragic death.

JONATHAN I. CHARNEY\*

### CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed.

TO THE EDITOR IN CHIEF:

June 17, 1985

In *Progressive Development of International Law and the Package Deal* (at p. 871 *supra*), Hugo Caminos and Michael R. Molitor quite accurately portray the procedural underpinnings of the negotiations at the Third United Nations Law of the Sea Conference (UNCLOS III) as involving a "package

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deal." They conclude that the 1982 Convention drafted by UNCLOS III "represents an indivisible package of interrelated compromises in which third states [read, nonparties] cannot generally find support for the exercise of customary rights." The authors later clarify this point, making it clear that in their view nonparties may exercise customary rights but may not exercise new rights created by the Convention.

It is certainly hornbook law to conclude that a nonparty cannot assert rights created by a treaty. In this particular instance, however, I believe it would make sense to view the navigational regime in the Convention as being open to all nations. Whether the legal basis is one of "third party beneficiary" or otherwise, it would be cumbersome, if not unworkable, for the international community to operate under two or more navigational regimes. To take an "all or nothing" approach in the implementation phase of a broad, multipurpose treaty such as the 1982 Convention is self-defeating and unrealistic.

After a marathon negotiating effort over a period of 10 years, it is understandable that many nations greeted the last-minute decision of the United States not to sign the 1982 Convention with a degree of consternation. As it was clear that the U.S. objections were directed to only one portion of the text—deep seabed mining—a feeling was generated that the United States intended to "pick and choose" among the good and the bad of the Convention. This was considered to be a violation of the spirit and intent of the "package deal," a concept that was considered by many to be fundamental to the negotiations.

The authors cite Ambassador Koh, the President of UNCLOS III, who accurately summarized the views of many delegations to the conference when he stated at the closing session:

The second theme which emerged from the statements [of many delegations] is that the provisions of the Convention are closely interrelated and form an integral package. Thus it is not possible for a State to pick what it likes and to disregard what it does not like. It was also said that rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations [p. 886 *supra*].

It should not be viewed as surprising that at the initial negotiating session in 1974, the conference adopted rules of procedure that included a so-called Gentleman's Agreement. Designed, *inter alia*, to ameliorate the tyranny of the majority, it provided: "The Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted." This arrangement, of course, caused even the agreed text to remain open-ended—including the navigational portions that had been fully negotiated by 1977. Thus, in a negotiating context, it is true that the entire Convention could be properly viewed as a "package deal." In a way, the Gentleman's Agreement served its purpose, as there was no vote on substantive matters until the very end of the conference.

As has been the pattern in other complex multilateral treaty negotiations, various imaginative devices were employed to keep the discussions moving in a positive direction and avoid deadlocks: frequent informal negotiating sessions, the formation of informal groups of "like-minded" states, numerous

off-the-record intersessional meetings, the use of informal drafting groups and plain old-fashioned horse trading in the corridors.

The "package deal" approach was not unique to this conference. Indeed, for better or worse, virtually all international negotiations proceed along the lines of an "all or nothing at all" approach. What was perhaps unique to this conference was the large number of broad-based, institutionalized "give and take" arrangements, procedures and forums and the long period over which they operated, almost a decade.

This approach to treaty making, however, carries a significant price tag: it is difficult, if not impossible, to determine the level of true international support for any particular article based on its own merits. Thus, even if the 1982 Convention were to be ratified by all nations, prior to the implementation of any particular article through an established pattern of state practice, in practical terms, its viability must be subject to some question.

There is, however, a vast difference between how a treaty is negotiated and how it is implemented. If the treaty process is to succeed, the "package deal" must be viewed as having an entirely different meaning in each instance. As pointed out, while a treaty is being negotiated, entirely unrelated sections and articles can be, and frequently are, used for trading purposes. This was certainly the case at UNCLOS III.

On the other hand, during the implementation phase it makes sense to link only provisions that are functionally related. For example, the provisions establishing the archipelago concept are functionally related to those that deal with archipelagic sea-lane passage. Both must be implemented simultaneously to maintain a balanced maritime regime. In my judgment, orderly implementation of the regimes contemplated by the 1982 Convention can only be accomplished if the "package deal" is seen in this light.

The nonseabed portion of the 1982 Convention should be viewed with its own temporal, as well as substantive and procedural, issues, which can only be effectively dealt with as separate initiatives.

During the course of the law of the sea negotiations, U.S. representatives frequently made the point that functional linkage was the key to the development and implementation of a stable international maritime regime. As cited by the authors, in its report on the second session, the U.S. delegation stated:

The idea of a territorial sea of 12 miles and an exclusive economic zone beyond the territorial sea up to a total maximum distance of 200 miles is, at least at this time, the keystone of the compromise solution favored by the majority of the States participating in the Conference.

. . .

Acceptance of this idea is of course dependent on the satisfactory solution of other issues, especially the issue of passage through straits used for international navigation, [and] the outermost limit of the continental shelf . . . [p. 874 *supra*].

The U.S. delegation report on the third session included the following observation:

Negotiation of a balance of rights and duties in the 200-mile economic zone is one of the most important elements of a satisfactory package

. . . a substantial consensus continues on a territorial sea of 12 miles. There appears to be a strong trend in favor of unimpeded passage of straits used for international navigation as part of a Committee II package.

As the authors conclude, generally speaking, as a matter of international law, nonparties cannot assert any new rights created under the 1982 Convention. This would be generally true whether or not the Convention were viewed as a "package deal." On the other hand, to the extent the Convention articulates customary law, continued enjoyment of such rights should not be viewed as an assertion "under the Convention."

This brings me to the crucial point. The authors conclude that part III, section II of the 1982 Convention dealing with transit passage establishes new and unique rights. And that therefore the "full thrust" of the legal effect of the package deal will serve to deny such rights to nonparties. The authors confuse the articulation of a legal right with the existence of the legal right itself.

The fact is, many maritime states have for many decades been exercising rights in international straits that look, taste and smell like "transit passage." It should not be viewed with amazement that the negotiators agreed to a formulation that accurately reflected navigational rights that had been asserted by these maritime states through a prolonged process of claim and counterclaim. What many conferees had in mind was to codify "business as usual" while expressly protecting the interests of coastal states.

I wonder if it is time for the international legal community to rethink the entire issue of treaty ratification and implementation. Perhaps more weight should be given to the political and diplomatic realities that underlie the treaty process. It is terribly self-defeating to let technical signature and ratification issues stand in the way of the informal implementation of all the good ideas contained in a treaty.

In any event, it is to be hoped that such collateral issues will not preclude the fair and balanced implementation of the navigational provisions of the 1982 Convention. We should not lose sight of a fundamental fact: On the crucial issue of whether the Convention will serve as an effective framework for a stable and nonconfrontational maritime milieu in the future, the question of when, or if, the Convention "legally" comes into force is largely irrelevant.

BRUCE HARLOW\*

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TO THE EDITOR IN CHIEF:

May 22, 1985

The article on the UN Sub-Commission in your January issue (79 AJIL 168 (1985)) states on page 171 that within weeks of an NGO intervention

\* The writer served from 1981 to 1983 as the Department of Defense and Joint Chiefs of Staff Representative for Ocean Policy Affairs. During that period, he was appointed Vice Chairman of the U.S. delegation to UNCLOS III. These comments were drawn, in part, from a section of a paper prepared for the Institute for Marine Studies and Washington Sea Grant, University of Washington. The views expressed here should not be taken as reflecting official positions of the U.S. Government.

on Japanese mental hospitals, "legislation was introduced to regulate the admission and treatment of mental hospital patients." Unfortunately no such legislation has been introduced or is programmed.

As the Japanese representative at the Sub-Commission said, the Minister of Health and Welfare asked his advisory group in June 1984 to draft guidelines on the treatment of patients in mental hospitals. This is as far as they have gone, and it was set in motion before the meeting of the Sub-Commission. It will not involve any new legislation, and will merely set recommended standards of practice without any force of law.

NIALL MACDERMOT

*Secretary-General, International Commission of Jurists*

TO THE EDITOR IN CHIEF:

May 17, 1985

In an Editorial Comment last year (78 AJIL 121 (1984)), Oscar Schachter objected to continued reliance on the so-called Hull formula, requiring the payment of "prompt, adequate and effective" compensation in cases of otherwise lawful expropriation of alien property; he argued in favor of a "just compensation" formula which, in his view, was more flexible and could in certain cases (for the most part unspecified) warrant the payment of less than full compensation. This year, in the April issue (79 AJIL 414 (1985)), I took issue with one aspect of this argument, viz., his analysis of the international case law in relation to the *adequacy* of compensation. Whilst Professor Schachter was correct in stating that none of the international judicial or arbitral decisions had upheld the Hull formula in so many words, I ventured to suggest that his analysis was either misleading or erroneous insofar as it tended to suggest (in line with his general thesis) that the case law supported a flexible standard of "just" compensation rather than the payment of full compensation.

In a reply appended to my Note (*id.* at 420), Professor Schachter attempts to counter this criticism. In the course of doing so, he misinterprets my clearly stated position and raises issues outside the scope of the discussion; but even then, it is submitted, he fails to refute my argument.<sup>1</sup>

Briefly, my point was that, even if the cases do not employ the Hull formula as such, the tribunals concerned did require the payment of full compensation

<sup>1</sup> Schachter's original piece was written in defense of the formulation of the "just compensation" rule in a draft of the *Restatement of the Foreign Relations Law of the United States (Revised)*, which appeared to be somewhat hesitant about declaring the Hull formula to be general international law. See §712 (Tent. Draft No. 3, 1982). Contemporaneously with the publication of my reply, however, a new draft was issued (Tent. Draft No. 6, 1985), which states the rules regarding compensation for expropriation in a more "conservative" fashion. While avoiding use of the Hull formula, the new draft approximates it:

[F]or compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and must be paid at the time of taking, or within a reasonable time thereafter with interest from that date, and in a form economically usable by the foreign national.

At its meeting on May 14-17, 1985, the American Law Institute tentatively approved this revised version for incorporation in the new *Restatement*.

and provided no positive support for Schachter's supposed flexible rule. I also sought to show that references in those decisions to "just" or "fair" compensation, far from supporting his thesis, were in fact understood by the tribunals concerned to entail the payment of the full value of the property taken.

Of course it is true, as Schachter's reply emphasizes so heavily, that "no decision asserts that the specific criteria of valuation applied in the case are universally applicable" (p. 421); I made that point myself. But this does not further his argument. In the first place, since different cases involved (and may involve) different types of property, it is hardly surprising that the "specific criteria of valuation" employed in any given decision were not claimed to be universally applicable; what is more to the point is that they all<sup>2</sup> required the payment of the full value of the property.<sup>3</sup> Secondly, it is a common practice of courts (still more of arbitrators) to deal with the facts before them rather than indulge in broad generalizations; those who come after have to derive the general principles from the particular decisions. Thirdly, it is a fact that, in a number of these cases (including the famous *Chorzow Factory* case<sup>4</sup>), the existence of a duty to pay full compensation was treated as axiomatic. Furthermore, if, as Schachter contends, the level of compensation is variable and depends on circumstances, one might perhaps expect these matters to have been canvassed in at any rate some of the cases, where mitigating factors were arguably present.

In short, the least that one can say about these cases is that, when properly analyzed, they give no positive support to the flexible standard for which Schachter contends—which was the main point of my article. It could, indeed, be plausibly argued that they provide some authority for the contrary thesis that *full* compensation is required—which would be hardly surprising, given the political and philosophical climate prevalent at the time when most of the decisions were handed down.

Schachter also characterizes me as an unreconstructed supporter of the Hull formula. For me to have nailed my colors to that or any other mast merely on the basis of case law would have been foolish indeed: as I myself stated, a complete statement of the rules would entail a comprehensive examination of a variety of sources of international law, of which "[c]ase law is far from being the only, or the most important" (p. 419). Within the confines of a short article, I was simply attempting to correct a misleading account of the cases on one aspect of the problem—quantum—and was not purporting to give a synoptic picture of even the "traditional" customary law. Insofar as Schachter's reply to me canvasses other matters, such as state practice and the opinions of jurists, it consequently misses the point.

Finally, Professor Schachter relies on policy considerations, such as the interests of investors and the countries concerned. As it happens, there are

<sup>2</sup> With the partial exception of the controversial *LIAMCO* arbitration (Libyan American Oil Co. v. Government of the Libyan Arab Republic, Apr. 12, 1977, 52 ILR 140 (1982), 20 ILM 1 (1981)).

<sup>3</sup> Since I wrote my Note, a further decision of the Iran-United States Claims Tribunal supporting the "full compensation" standard has come to hand: *Starrett Housing Corp. v. Islamic Republic of Iran*, Dec. 19, 1983 (Chamber One), 23 ILM 1090 (1984). See also the award in *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, June 29, 1984 (Chamber Two), *IRANIAN ASSETS LITIGATION REP.*, July 13, 1984, at 8,820, 8,828-29.

<sup>4</sup> 1928 PCIJ, ser. A, No. 17.



a number of radical reforms of the international economic system which I would personally like to see; but that is not the issue. I stated more than once in my contribution that I was not discussing *lex ferenda*; past decisions are past decisions, and I strongly believe in the desirability of not allowing one's view of the facts to be clouded by what one might or might not like to see.

Whether the case law on expropriation is to my taste is not, therefore, the point; all that I have tried to do is to give an honest and accurate account of it. With all due respect, I do not think that Professor Schachter has succeeded in refuting that account.

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# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH\*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

## ALIENS

(U.S. *Digest*, Ch. 3, §3)

### *Cuban Suspension of Operation of 1984 Agreement for Return of Mariel Cubans*

On May 19, 1985, the United States Interests Section of the Swiss Embassy at Havana informed the Cuban Ministry of Foreign Affairs that the Voice of America would make a change in its long-standing Spanish-language broadcasts to Cuba, and would begin transmitting the Radio Martí program the following day.<sup>1</sup> The 14½-hour daily transmissions include "accurate, balanced, and objective news reports, as well as a variety of news-related, feature, and entertainment programs."<sup>2</sup>

The Cuban Government thereupon (i.e., several hours before actual transmission began) announced that it had decided to suspend "every kind of activity relating to the execution of" the December 1984 Agreement with the United States. That Agreement provided, in part, for the return of 2,746 named Cuban nationals from the 1980 Mariel boatlift, who had been

\* Office of the Legal Adviser, Department of State.

<sup>1</sup> The Radio Broadcasting to Cuba Act, Pub. L. No. 98-111, approved Oct. 4, 1983, 97 Stat. 749, 22 U.S.C. §1465 *et seq.*, contains the following statement of congressional findings and purposes, in section 2:

(1) that it is the policy of the United States to support the right of the people of Cuba to seek, receive, and impart information and ideas through any media and regardless of frontiers, in accordance with article 19 of [the] Universal Declaration of Human Rights;

(2) that, consonant with this policy, radio broadcasting to Cuba may be effective in furthering the open communication of accurate information and ideas to the people of Cuba, in particular information about Cuba;

(3) that such broadcasting to Cuba, operated in a manner not inconsistent with the broad foreign policy of the United States and in accordance with high professional standards, would be in the national interest; and

(4) that the Voice of America already broadcasts to Cuba information that represents America, not any single segment of American society, and includes a balanced and comprehensive projection of significant American thought and institutions but that there is a need for broadcasts to Cuba which provide news, commentary and other information about events in Cuba and elsewhere to promote the cause of freedom in Cuba.

97 Stat. 749.

<sup>2</sup> See DEPT. ST. BULL., No. 2100, July 1985, at 89.

ineligible to enter the United States under the Immigration and Nationality Act, because they either had committed serious crimes in Cuba or in the United States or suffered from severe mental disorders.<sup>3</sup> The Cuban Government had also decided, the announcement continued, to "suspend every kind of travel to Cuba by citizens of Cuban origin resident in the United States, except that authorized for strictly humanitarian reasons." The announcement charged that the "clear aim" of the Radio Martí broadcasts was

to respond coarsely to the solid and unanswerable denunciations and pronouncements by the Cuban Government about the critical economic situation of Latin America and the Third World, and about the immoral and unpayable foreign debt and the unmerciful economic sacking which the unjust system of international relations has imposed on these countries.

In addition, on May 29, 1985, the Cuban Government refused to permit the departure of a (second) flight of refugees (former political prisoners and their families) from Havana to Miami under the 1984 Agreement. The first flight of such refugees, whose travel the United States Government funds, had departed on May 20.

Having received no indication that Cuba was prepared to resume implementation of the 1984 Agreement, the United States Government announced in response, on June 14, 1985, that it would suspend preference immigrant visa processing in Havana at the close of business on June 18. The suspension did not affect issuance of nonimmigrant visas or of immigrant visas to returning permanent residents of the United States and persons in the immediate relative category. That category, which includes spouses, unmarried minor children, and parents of U.S. citizens, is not subject to the total annual limitation of 20,000 applicable to immigrant visas in the six preference and one nonpreference categories.

#### EXTRADITION

(U.S. *Digest*, Ch. 3, §5)

##### *United States-United Kingdom Supplementary Treaty*

On July 2, 1985, Secretary of State George P. Shultz submitted to President Ronald Reagan the Supplementary Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, with Annex, signed at Washington on June 25, 1985. The Secretary recommended to the President that he transmit the Supplementary Extradition Treaty, considered a significant step toward improving

<sup>3</sup> See further 79 AJIL 431 (1985); 77 AJIL 875-76 (1983); and 75 AJIL 144-45 (1981). Return of the Mariel excludables under the 1984 Agreement had begun on Feb. 20, 1985, following denial on Feb. 1, 1985, by Supreme Court Justice William H. Rehnquist, in his capacity as Circuit Justice, of an application to vacate stay, in *Garcia-Mir v. Smith*, No. A-582 (U.S. S.Ct. filed Jan. 28, 1985).

law enforcement cooperation and eliminating terrorism, to the Senate for advice and consent to ratification.<sup>1</sup>

The current Extradition Treaty between the United States and the United Kingdom<sup>2</sup> provides in Article V(1)(c)(i) that extradition shall not be granted if the offense for which extradition is requested is regarded by the requested party as one of a political character (the "political offense exception"). Article 1 of the Supplementary Extradition Treaty provides that this provision shall not apply to a list of specified crimes of violence (typically committed by terrorists), including offenses under four multilateral conventions: the 1970 Hague Aircraft Hijacking Convention;<sup>3</sup> the 1971 Montreal Aircraft Sabotage Convention;<sup>4</sup> the 1973 New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents;<sup>5</sup> and the 1979 Hostages Convention.<sup>6</sup> The list also includes murder; manslaughter, malicious assault; kidnapping; certain offenses relating to explosives, firearms, or ammunition; damage to property with intent to endanger life or with reckless disregard for endangering life; and attempts to commit any of the foregoing offenses.

Other amendments to the 1972 Extradition Treaty are contained in Articles 2 and 3 of the 1985 Supplementary Treaty. Article 2 amends the statute of limitations provision in Article V(1)(b) of the 1972 Treaty by providing that extradition may be denied if prosecution is time-barred under the laws of the requesting party, whereas the 1972 Treaty permits denial if prosecution is time-barred by the laws of either the requested or the requesting party. Article 3 of the 1985 Supplementary Treaty amends Article VIII(2) of the 1972 Treaty by increasing from 45 to 60 days the time during which a person may be detained under an application for provisional arrest, pending a request for extradition.

The provisions of the 1985 Supplementary Treaty apply, under its Article 4, to any offense committed before or after its entry into force, but offenses committed prior to its entry into force must have been offenses at the time of commission under the laws of both the requested and the requesting party.

Article 5 of the Supplementary Extradition Treaty provides that it forms an integral part of the 1972 Treaty; and it includes in the area of applicability

<sup>1</sup> On July 17, 1985, President Reagan transmitted the Supplementary Extradition Treaty to the Senate. For the text, see S. TREATY DOC. 8, 99th Cong., 1st Sess. (1985).

<sup>2</sup> June 8, 1972, 28 UST 227, TIAS No. 8468 (entered into force Jan. 21, 1977).

<sup>3</sup> Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *done* Dec. 16, 1970, 22 UST 1641, TIAS No. 7192 (entered into force Oct. 14, 1971).

<sup>4</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *done* Sept. 23, 1971, 24 UST 564, TIAS No. 7570 (entered into force Jan. 26, 1973).

<sup>5</sup> Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *done* Dec. 14, 1973, 28 UST 1975, TIAS No. 8532 (entered into force Feb. 20, 1977).

<sup>6</sup> International Convention Against the Taking of Hostages, GA Res. 34/146 (Dec. 17, 1979) (entered into force June 3, 1983; for the United States, Jan. 6, 1985).

for the United Kingdom those territories, listed in an Annex, for whose international relations the United Kingdom is responsible.

Press guidance prepared in the Office of the Legal Adviser of the Department of State in connection with submission of the Supplementary Extradition Treaty suggested the unsuitability of the "political offense exception" in regard to extradition requests between the United States and the United Kingdom, "two democratic countries sharing the same high regard for the fundamental principles of justice and operating similar independent judicial systems."<sup>7</sup> Note was made that the United Kingdom was already a party to the European Convention on the Suppression of Terrorism,<sup>8</sup> which permits Council of Europe members not to regard as political a range of offenses similar to those in Article 1 of the United States-United Kingdom Supplementary Treaty. Under the political offense exception in the 1972 Extradition Treaty with the United Kingdom, American courts in several recent cases have denied extradition of accused or convicted Provisional Irish Republican Army members ("Provos").<sup>9</sup>

#### DIPLOMATIC PRIVILEGES AND IMMUNITIES

(U.S. *Digest*, Ch. 4, §1)

##### *Motor Vehicles: Compulsory Liability Insurance*

With a circular note to the Chiefs of Mission at Washington, dated January 29, 1985, the Secretary of State distributed "Insurance Information" certificates for use in submitting the missions' annual insurance report on mission vehicles as well as on the personally owned vehicles of mission members, in accordance with requirements established by the Foreign Missions Amendments Act of 1983.<sup>1</sup>

In addition to completing the certificate, each mission, as well as each individual insurance policyholder at the mission, was asked to attach to it a copy of the front ("declarations") page of the policy insuring the vehicle described on the form, which provides proof of specific insurance details (e.g., the amount of insurance coverage, the name of the insured driver and the policy expiration date).

The Secretary's note also gave notice that, effective March 15, 1985, the minimum amount of automobile liability insurance coverage for all foreign missions and employee-owned vehicles throughout the United States was required to be at least \$300,000 combined single limit (CSL); i.e., all personal liability and property damage arising from a single accident. Each vehicle registered to a mission or mission member would be required to maintain liability insurance at that level.

<sup>7</sup> Dept. of State File No. P85 0096-0902.

<sup>8</sup> *Done* Jan. 27, 1977. For the text, see 15 ILM 1272 (1976).

<sup>9</sup> See, e.g., *In re Extradition of Patrick Doherty*, 599 F.Supp. 270 (S.D.N.Y. 1984).

<sup>1</sup> Title VI of the Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98-164, §603, approved Nov. 22, 1983, 97 Stat. 1017, 1042, 22 U.S.C. §4304. See 78 AJIL 435 (1984).

of Protocol would therefore not accept citations for violations of traffic ordinances. If a mission wished to contest the facts forming the basis for issuance of a particular traffic citation, the note continued, it should bring the matter directly to the attention of the appropriate jurisdiction (in the District of Columbia, the Bureau of Traffic Adjudication in the Department of Public Works).

The Secretary's circular note stated in part:

The Department reminds the diplomatic community that persons enjoying diplomatic privileges and immunities have a duty under international law, as codified in Article 41 of the Vienna Convention on Diplomatic Relations, to respect the laws and regulations of the receiving State. The operation of a motor vehicle in the United States is a privilege, not a right, and is reserved for those of the requisite age, physical competence and responsibility necessary to perform properly the complex skills and duties associated with the operation of an automobile. In this connection the Department reiterates its position that members of diplomatic missions are expected to operate their automobiles in accordance with local traffic laws and regulations and pay fines incurred through the violation of local traffic ordinances. Failure to do so may result in the loss of the driving privilege.

The Department of State requests the cooperation of the Chiefs of Mission in resolving the problem of parking offenses and unpaid fines which has hindered the Department's efforts to uphold community understanding and acceptance of diplomatic privileges and immunities.<sup>1</sup>

Following expressions of concern from a number of missions, the Secretary of State issued a clarification of the policy set out in the above note. A further note, dated December 17, 1984, read in part:

The Chiefs of Mission are advised that the Department's discontinuance of its practice of requesting cancellation of traffic citations on behalf of foreign missions does not affect the immunities of members of missions delineated in the Vienna Convention on Diplomatic Relations. Members of diplomatic missions, for example, to whom the provisions of Article 31 of the Vienna Convention apply, will not be required to appear in court or otherwise to personally submit themselves to the civil or administrative jurisdiction of local authorities. However, the immunity from jurisdiction does not imply that the receiving State must allow all individuals with such immunity the privilege of operating an automobile, or continue to grant such a privilege if abused.

The Chiefs of Mission are further advised that the issuance of a traffic citation is not considered a violation of the immunities to which members of missions may be entitled. Such citations give notice that the recipient has disobeyed local traffic laws or regulations, which constitutes a failure to "respect the laws and regulations of the receiving State" as required by Article 41 of the Vienna Convention. The penalty attached to the citation is normally a fine. Payment of the fine is an acknowledgment of the violation of law and acceptance of the penalty.

<sup>1</sup> Dept. of State File No. P84 0091-0626.

The policy of the Department of State for its representatives abroad has been that fines for traffic violations should be paid. The Department has informed the Chiefs of Missions for many years that diplomatic missions in the United States are expected to adopt a similar policy. The Department is aware, however, that such a payment is voluntary and cannot be compelled. Furthermore, local jurisdictions may not take further punitive action against diplomatic agents such as the towing of the automobile or arrest of the individual for failure to pay such fines.

Notices of violations which are not paid, or otherwise resolved, do nonetheless record a failure to obey local law and therefore will be maintained by the jurisdiction concerned and communicated to the Department of State. The Department, through its Office of Foreign Missions, will review the nature and extent of the violations of laws and regulations by an individual member of a mission. The Department then will make a judgment as to whether such violations indicate a flagrant disregard for the laws of the United States and whether the individual shall be permitted to continue to operate an automobile in this country.<sup>2</sup>

(U.S. Digest, Ch. 4, §1)

*Real Property—Reciprocity*

In a follow-up to earlier circular notes regarding the requirement for notification to the Department of State prior to any acquisition or disposition of real property, the Secretary of State, George P. Shultz, by a circular note dated November 30, 1984, informed the Chiefs of Mission at Washington of a further requirement for notification to the Department "by diplomatic note of the exact dates when any property, subject to the requirements of this note and of the notes of October 1, 1982, January 14, 1983, and June 1, 1983,<sup>1</sup> is vacated and a new property occupied."

The Secretary's circular note continued:

According to the Department's records, a number of foreign missions have occupied properties without first requesting from the Department advance permission to do so, as required by Section 202(a) of the Foreign Missions Act.

In that regard, the Department wishes to call attention once again to Section 205(b) of the Foreign Missions Act, which states: "The Secretary may require any foreign mission to divest itself of, or forgo the use of, any real property determined by the Secretary—(1) not to have been acquired in accordance with this section." Failure to comply with the advance notification provisions of the Act could force the Department to invoke the abovementioned provision of the Act.

Missions should also understand that the Department's granting approval for a mission to proceed with its proposal to acquire property does not relieve that mission of its responsibility to satisfy local zoning

<sup>2</sup> *Id.*, No. P85 0001-0980. See further 78 AJIL 437 (1984).

<sup>1</sup> See 78 AJIL 430-35 (1984).

or other State, county or municipal legal requirements concerning property acquisition. Satisfaction of these requirements is solely the responsibility of the requesting mission.

The Department of State, in transmitting this note to Their Excellencies, Messieurs and Mesdames the Chiefs of Mission, solicits the co-operation of all missions in meeting these requirements.<sup>2</sup>

Circular notes to the Embassies of the People's Republic of Bulgaria, the People's Republic of China, the Czechoslovak Socialist Republic (including its Cuban Interests Section), the German Democratic Republic, the Hungarian People's Republic, the Iranian Interests Section of the Embassy of the Democratic and Popular Republic of Algeria, the Iraqi Interests Section of the Embassy of India, the Embassy of the Polish People's Republic, the Embassy of the Socialist Republic of Romania, the Embassy of the Syrian Arab Republic and the Embassy of the Union of Soviet Socialist Republics contained, as well, the following additional requirement:

In addition to the foregoing, the Department, from the date of this note, will require all property acquisitions, purchased or leased, made in the name of or on behalf of an *individual member* of the mission or a member of that individual's family (as opposed to property acquisitions made in the name of the mission itself, or the government represented by that mission), to receive prior approval by the Department of State, pursuant to Section 202(a)(5) of the Foreign Missions Act, Title II, P.L. 97-241, 22 U.S.C. 4301 et seq. All lease *renewals*, whether made in the name of the mission, or of an individual member of the mission, or a member of that individual's family, must receive prior approval by the Department of State.<sup>3</sup>

#### STATE REPRESENTATION

(U.S. *Digest*, Ch. 4, §2)

##### *Establishment of Consular Posts*

An increase in requests from foreign missions at Washington for permission to establish consular posts in the United States and a corresponding increase in the number of consular premises requiring protection by American law enforcement authorities led to a review by the Department of State of its policy governing consular recognition. The review was also prompted by expressions of congressional concern that the number of persons entitled to various kinds of immunity from jurisdiction in the United States be held

<sup>2</sup> Dept. of State File No. P84 0174-1759.

<sup>3</sup> *Id.*, No. P84 0174-1762.

The Department of State also requested the United States Mission to the United Nations to dispatch notes similar to the two above, including in the first group of addressees all permanent missions and observer missions, except those listed in the second group of addressees, and including in the latter, as well, the Permanent Mission of the People's Socialist Republic of Albania, the Permanent Mission of the Socialist People's Libyan Arab Jamahiriya, the Permanent Observer Mission of the Democratic People's Republic of Korea (North Korea), and the Observer Mission of the Palestine Liberation Organization. Dept. of State to U.S. Mission to United Nations, telegrams, Dec. 18, 1984, Nos. State 370820 and 370821.



within reasonable limits. Such expressions of concern are reflected in the legislative histories of the Diplomatic Relations Act of 1978 and the Foreign Missions Act of 1982, as amended by the Foreign Missions Amendments Act of 1983.<sup>1</sup>

A circular note from the Secretary of State to the Chiefs of Mission at Washington, dated February 27, 1985, set out the new guidelines that the Department would apply from that time onward in considering requests for the establishment of consular posts, the recognition of consular officers and the continuation of existing consular posts, particularly those headed by honorary consular officers. The substantive portion of the note follows:

The Department recognizes that in many instances, a larger consular presence in the United States represents the further development of friendly relations, as well as the expansion of consular functions, both of which are important to the United States in its intercourse with other nations. The Department encourages these developments in every appropriate way.

The Department has noted, nevertheless, that in recent years there has been an increase in the number of requests for the establishment of consular posts headed by both career consular officers and honorary consular officers, and a concomitant increase in consular personnel posted in the United States. Department records indicate, for example, that at present there are 502 consular posts headed by career consular officers and 1,012 posts headed by honorary consular officers. Up to this time, the majority of requests to open consular offices have received the Department's approval. However, the presence in the United States of a very large number of consular posts has caused the Department to review its policy governing consular recognition.

This review has come about, in part, owing to the additional demands which are being made upon law enforcement authorities worldwide to protect diplomatic and consular premises. Although the United States is ever mindful of its obligation under international law to protect consular premises, the Chiefs of Mission will appreciate that the number and size of consular posts must be manageable to enable the receiving State to fulfill this obligation when there is a need. Moreover, the Congressional desire to limit the numbers of persons entitled to privileges and immunities in this country, reflected in the passage of the Diplomatic Relations Act of 1978 and the Foreign Missions Act of 1982, also must be addressed.

Therefore, the Department henceforth will apply new guidelines in its consideration of requests for the establishment of consular posts, the recognition of consular officers and the continuation of existing

<sup>1</sup> The Diplomatic Relations Act, Pub. L. No. 95-393, approved Sept. 30, 1978, is at 92 Stat. 808, 22 U.S.C. §§254a-254e, 28 U.S.C. §§1364, 1351, and 1251(a), (b) (Supp. II 1978). The Foreign Missions Act, Title II of the Department of State Authorization Act, Fiscal Years 1982 and 1983 (Pub. L. No. 97-241, approved Aug. 24, 1982, 96 Stat. 273, 282, 22 U.S.C. §§2662, 4301-4313, 2684, 254a-254c, 28 U.S.C. §1364 (1982), 5 D.C.C. §418 (1981 ed., 1982 Cum. Supp.)), amended by the Foreign Missions Amendments Act of 1983, Title VI of the Department of State Authorization Act, Fiscal Years 1984 and 1985 (Pub. L. No. 98-164, approved Nov. 22, 1983, 97 Stat. 1017, 1042, 22 U.S.C. §§254e, 4304a, 4303).

consular posts—in particular, those headed by honorary consular officers. For example, upon the completion of the duties of an honorary consul, the Department may not approve automatically a request for a replacement. Also, honorary consular appointments will be reviewed to ensure that there is a need for consular services and that the appointment is not being made due to only political or honorific considerations.

Application of the new standards will require detailed, written justifications on the part of the diplomatic missions explaining the bases for the requests being made. Among the considerations which the Department will take into account when examining such requests include:

*I. The Establishment and Maintenance of Career and Honorary Posts*

1. The degree and significance in the consular district of features of economic, commercial, scientific, cultural or educational interest to the sending State;

2. The need in the consular district to render assistance to sending State nationals and to foster cultural or ethnic ties with the local population;

3. The need in the consular district to process visa and passport requests;

4. The need in the consular district for supervision or inspection of sending State vessels or aircraft;

5. The size and location of the consular district, its classification (consulate-general, consulate, vice-consulate), the location of the proposed or existing consular establishment, the proximity to other consular posts maintained by the sending State, the proposed jurisdiction of the post and the possibility of consolidation.

*II. Recognition of Career and Honorary Consular Officers*

1. The same criteria set forth above;

2. The level of staffing at an existing consular post;

3. Whether recognition would be in accordance with applicable U.S. law and policy;

4. In the case of proposed honorary consular officers, whether, and to what extent, the candidate would be available to perform and capable of performing consular functions.

The Department of State anticipates that the application of these guidelines will enable it, over the long term, to fulfill its obligations to protect diplomatic and consular premises and to implement the Congressional directive regarding the numbers of persons entitled to privileges and immunities while also ensuring that consular services are provided to the greatest degree possible.<sup>2</sup>

<sup>2</sup> Dept. of State File No. P85 0039-1525.

## JUDICIAL DECISIONS

MONROE LEIGH

*Act of state doctrine—commercial activity exception—situs of debt*

**BRAKA v. BANCOMER, S.N.C. 762 F.2d 222.**

U.S. Court of Appeals, 2d Cir., May 20, 1985.

Plaintiffs, U.S. citizens, brought suit in federal district court claiming damages for breach of contract in connection with their purchase of certificates of deposit (CDs) from defendant Bancomer, S.A. (Bancomer), a Mexican bank. Following the district court's ruling that their claim was barred by the act of state doctrine, plaintiffs appealed. The U.S. Court of Appeals for the Second Circuit (per Meskill, J.) affirmed and *held*: that the situs of the defendant's obligation was in Mexico and therefore the act of state doctrine barred relief.

Plaintiffs' claims arose out of their 1981 purchase of peso and dollar denominated CDs in the total amount of U.S. \$2,100,000 from Bancomer when it was a privately owned Mexican bank. These purchases were arranged by telephone with Bancomer's Mexico City office and effected by either transfer of plaintiffs' funds on deposit in Mexico or delivery of checks payable to Bancomer's New York agency.<sup>1</sup> The CDs identified Mexico as the place of deposit and the place of payment of principal and interest. As a matter of convenience for the plaintiffs, however, such payments were sometimes transferred to their New York banks. In August 1982, shortly before the first of these certificates was to reach maturity, the Mexican Ministry of Treasury and Public Credit issued a decree mandating that all domestic obligations be performed by delivery of pesos and that the use of foreign currency as legal tender was prohibited. Two additional decrees in September 1982 established a system of exchange that resulted in plaintiffs' receiving Mexican pesos at an officially prescribed rate of 70–80 pesos per dollar upon the maturity of their certificates.

Plaintiffs brought suit, claiming damage in excess of \$900,000 based on the then actual market exchange rate of 135–150 pesos per dollar. The district court accepted jurisdiction under the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602–1611 (1982)) (FSIA), finding issuance of the CDs to be a commercial act and therefore within the commercial activity exception of 28 U.S.C. §1605(a)(2). The district court, however, concluded that the act of state doctrine barred plaintiffs' claims. The court rejected plaintiffs' attempts to invoke a commercial activity exception to the act of state doctrine.

On appeal, the court noted that the act of state doctrine bars judicial review of a foreign government's taking of property *within its own territory*.

<sup>1</sup> Bancomer's New York agency was not authorized to accept deposits, but transmitted the funds to the Mexican office.

In order to determine the situs of the allegedly expropriated property, the court proceeded to apply the test it had adopted 2 months earlier in *Allied Bank International v. Banco Credito Agricola de Cartago*.<sup>2</sup> According to the court, the *Allied* test turns on whether the taking is "able to come to complete fruition within the dominion of the [foreign] government."<sup>3</sup>

Observing that the CDs named Mexico City as the place of deposit and payment and that Bancomer had never agreed to make payment outside of Mexico, the court of appeals stated that the occasional acceptance of deposits in and transmission of payments to New York did not alter the contractually mandated situs specified on the face of the CDs. The court distinguished its decision in *Garcia v. Chase Manhattan Bank, N.A.*,<sup>4</sup> based on the parties' express provision in that case for repayment on the CDs at any Chase Manhattan branch worldwide.

After holding that the situs of Bancomer's obligations existed solely within the boundaries of Mexico, thereby barring recovery under the act of state doctrine, the court disposed of the plaintiffs' argument for a commercial activity exception to the doctrine. Declining to decide whether such an exception exists, the court of appeals simply confirmed the lower court's conclusion that Mexico's issuance of exchange controls to prevent monetary disaster was not a commercial activity.

The *Braka* case presented the Second Circuit with its second opportunity in recent months to consider the effect of foreign financial decrees on investments of U.S. entities. *Braka* consistently applied the test adopted in *Allied Bank* to determine the situs of the obligation, yet reached a contrary conclusion. The *Braka* court leaves open within the Second Circuit the question whether there is a commercial activity exception to the act of state doctrine.<sup>5</sup> Indeed, in declining to embrace such an exception, the court properly dismissed as *obiter dicta* statements in earlier decisions discussing a commercial activity exception.<sup>6</sup>

*Export Administration Act—antiboycott regulations—statute of limitations for enforcement action*

UNITED STATES V. CORE LABORATORIES, INC. 759 F.2d 480.  
U.S. Court of Appeals, 5th Cir., May 6, 1985.

On January 26, 1984, the United States brought an action to enforce a civil penalty against defendant, Core Laboratories, for antiboycott violations

<sup>2</sup> 757 F.2d 516 (2d Cir. 1985), summarized in 79 AJIL 733 (1985).

<sup>3</sup> 762 F.2d 222, 224 (quoting *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715-16 (5th Cir.), cert. denied, 393 U.S. 924 (1968)).

<sup>4</sup> 735 F.2d 645 (2d Cir. 1984), summarized in 79 AJIL 454 (1985).

<sup>5</sup> See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 696-706 (1976) (Opinion of White, J.).

<sup>6</sup> See *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 316 n.38 (2d Cir. 1981), summarized in 75 AJIL 968 (1981), cert. denied, 454 U.S. 1148 (1982); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 72-73 (2d Cir.), summarized in 71 AJIL 781 (1977), cert. denied, 434 U.S. 984 (1977).

that had occurred before August 1, 1978. Defendant asserted that the action was time-barred because the applicable 5-year limitation period had run. The relevant statute provides that "an action, suit or proceeding for the enforcement of any civil fine . . . shall not be entertained unless commenced within five years from the date when the claim first accrued."<sup>1</sup> Defendant contended that the statute began to run as of the date on which the violation had occurred; therefore, actions with respect to violations occurring before January 26, 1979 were barred. The United States argued that the claim first accrued on the date of the final administrative order assessing the penalty; in this case, March 14, 1983. The district court dismissed the action without opinion. The U.S. Court of Appeals for the Fifth Circuit (per Gee, J.) *held*: that the applicable time limitation begins to run on the date of the violation.

First, the court found that a review of prior cases dealing with a predecessor statute "clearly demonstrates that the date of the underlying violation has been accepted without question as the date when the claim first accrued, and, therefore, as the date on which the statute began to run."<sup>2</sup> The court noted that the Senate and House reports provided that "the time [for the running of the limitations period] is reckoned from the commission of the act giving rise to the liability, and not from the time of imposition of the penalty."<sup>3</sup> The court observed that practical considerations supported this interpretation. Since the progress of administrative proceedings is largely within the control of the Government and the Government is exempt from the consequences of its laches,<sup>4</sup> a "limitations period that began to run only after the government concluded its administrative proceedings would thus amount in practice to little or none."<sup>5</sup>

The Government also argued that the limitations period was tolled during the administrative proceedings. Despite the lack of authority for this position as a matter of law, the court concluded that the Government may be entitled to invoke the equitable powers of the court to toll the time limitation in this case. The court noted that if the Government's failure to file its action within the limitations period was caused by the "improperly dilatory tactics" of the defendants, tolling might be appropriate. Suggesting that the district court "may wish to require a 'clear and convincing' showing"<sup>6</sup> of those tactics before it invokes equitable tolling, the court remanded the case for determination of whether such tolling was warranted in this case.

<sup>1</sup> 28 U.S.C. §2462 (1982).

<sup>2</sup> 759 F.2d 480, 482. The court distinguished *United States Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982), which it characterized as an "anomaly" in the case law.

<sup>3</sup> See S. REP. NO. 363, 89th Cong., 1st Sess. 7, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 1826, 1832; H.R. REP. NO. 434, 89th Cong., 1st Sess. 5 (1965).

<sup>4</sup> See *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938); *United States v. Hughes House Nursing Home, Inc.*, 710 F.2d 891, 895 (1st Cir. 1983).

<sup>5</sup> 759 F.2d at 483.

<sup>6</sup> *Id.* at 484.

*Foreign Sovereign Immunities Act—tortious act exception—implied waiver of immunity—no private right of action under UN Charter and Helsinki Accords*

FROLOVA v. UNION OF SOVIET SOCIALIST REPUBLICS. 761 F.2d 370.  
U.S. Court of Appeals, 7th Cir., May 1, 1985.

Plaintiff, Lois Frolova, a citizen of the United States, filed suit in federal district court seeking an injunction and damages against the Soviet Union arising from the actions of Soviet officials who refused to permit her husband's emigration. The district court dismissed her action, finding that the denial of permission to emigrate was an act of state.<sup>1</sup> The U.S. Court of Appeals for the Seventh Circuit (per curiam) affirmed on other grounds and *held*: that under the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602–1611) (1982)) (FSIA), the Soviet Union was entitled to sovereign immunity and that the district court therefore lacked jurisdiction.

In May 1981, while visiting the Soviet Union, plaintiff married Andrei Frolov, a Soviet citizen. When plaintiff returned to the United States in June upon the expiration of her visa, her husband was denied permission to emigrate because of "bad relations with the United States." A second request was also denied in April 1982 on the ground that Frolov's departure was "not in the interest of the Soviet State." After plaintiff initiated this suit in district court, her husband received permission to leave the Soviet Union in June 1982. Although plaintiff dropped her request for injunctive relief, she continued to seek damages for mental distress and loss of consortium.

While the district court dismissed the case on act of state grounds, the court of appeals affirmed on the basis of sovereign immunity. Plaintiff relied on section 1604 of the FSIA, which provides that the immunity of a foreign state shall be subject, *inter alia*, to "existing international agreements." In this regard, she argued that the Soviet Union was a party to the UN Charter<sup>2</sup> and the Helsinki Accords,<sup>3</sup> and that certain provisions of those agreements waive immunity from suit.

The court held that plaintiff had no basis for enforcing through a private suit any rights or obligations under these agreements since the United States had not passed the requisite implementing legislation and since the treaties were not self-executing. The court found that the provisions relied upon in both agreements were phrased in broad generalities and couched in "prom-

<sup>1</sup> 558 F.Supp. 358 (N.D. Ill. 1983). The Soviet Union did not enter an appearance.

<sup>2</sup> June 26, 1945, 59 Stat. 1031, TS No. 993. Plaintiff relied on Article 55 of the Charter, which provides that the United Nations shall promote, *inter alia*, international cultural cooperation and universal respect for, and observance of, human rights and fundamental freedoms for all. Article 56 provides that all members pledge themselves to take action to achieve the purposes set forth in Article 55.

<sup>3</sup> Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 73 DEPT ST. BULL. 323 (1975), *reprinted in* 14 ILM 1292 (1975). The sections of the accords cited by Frolova provided that the signatory states would deal "in a positive and humanitarian spirit" "as expeditiously as possible" with applications of family members who sought to be reunited. *Id.* at 340, 15 ILM at 1314.

issory language" that left the signatory nations considerable discretion in implementation. According to the court, redress would have to be found through diplomatic channels or through the court of world opinion.

Plaintiff also argued that the Soviet Union had implicitly waived its immunity by signing the UN Charter and the Helsinki Accords and by failing to enter an appearance. In rejecting these arguments, the court observed that signing a treaty was not included in Congress's examples of implied waivers enumerated in the legislative history of the FSIA,<sup>4</sup> and that courts have generally required "convincing evidence" that the signatories intended such a waiver.<sup>5</sup> No such evidence was presented in this case. Regarding the Soviet Union's failure to participate in the litigation, the court again relied on the Act's legislative history, which demonstrated that Congress required a more concrete manifestation of waiver than is evidenced by a country's decision not to participate in litigation.<sup>6</sup>

Finally, plaintiff contended that jurisdiction could be founded on section 1605(a)(5) of the FSIA, which provides an exception to immunity in cases seeking damages for personal injury sustained in the United States and caused by the tortious act or omission of a foreign state.<sup>7</sup> The court observed that, although a literal reading of the statute supported this argument, the legislative history of the section was clearly to the contrary: Congress intended section 1605(a)(5) to address principally the problem of traffic accidents, thereby requiring that both the injury *and* the tortious act take place in the United States.

The *Frolova* court joins a number of others that have narrowly construed implied waivers of sovereign immunity and have read the section 1605(a)(5) exception to immunity to require that both the injury and the act occur in the United States.<sup>8</sup> Although legitimate victims of tortious conduct may lose a means of redress under this interpretation of the FSIA, Congress prudently limited U.S. court jurisdiction so as to preclude a host of international tort suits from being brought in the United States. Where possible, relief is likely

<sup>4</sup> See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 18, *reprinted* in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6617; S. REP. NO. 1310, 94th Cong., 2d Sess. 18 (1976). The legislative history cites as examples of implied waivers: (1) a foreign state's agreeing to arbitration in another country; (2) a foreign state's agreeing that a contract is governed by the law of another country; and (3) a foreign state's filing a responsive pleading in a case without raising an immunity defense.

<sup>5</sup> 761 F.2d 370, 378. See, e.g., *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 333 (9th Cir.), *cert. denied*, 105 S.Ct. 510 (1984).

<sup>6</sup> 761 F.2d at 378. See *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277-78 (2d Cir. 1984).

<sup>7</sup> The court apparently confused the characterization of the statute as providing a "waiver" of immunity. See 761 F.2d at 379. The provision, however, is styled as an "exception" to immunity. See 28 U.S.C. §1605(a)(5) (1982).

<sup>8</sup> See, e.g., *Persinger v. Islamic Republic of Iran*, 729 F.2d 335, 342-43 (D.C. Cir.), *cert. denied*, 105 S.Ct. 247 (1984); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1751 (1985); *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 645-46 (9th Cir.), *cert. denied*, 105 S.Ct. 295 (1984); *In re SEDCO, Inc.*, 543 F.Supp. 561, 567 (S.D. Tex. 1982).

to be more appropriately sought in the country where the tortious act occurred or, in extreme cases, through diplomatic channels.

*Sovereign immunity—express waiver of immunity—suit by one foreign national against another*

PROYECFIN DE VENEZUELA, S.A. v. BANCO INDUSTRIAL DE VENEZUELA. 760 F.2d 390.

U.S. Court of Appeals, 2d Cir., April 4, 1985.

Appellant, Proyecfin de Venezuela, S.A. (Proyecfin) brought suit in New York state court against Banco Industrial de Venezuela, S.A. (BIV) for damages arising from an alleged breach of contract and fiduciary duty. Both parties were Venezuelan corporations and the defendant bank was almost wholly owned by the Government of Venezuela. After the case was removed to federal district court, Proyecfin moved to remand the action to state court. The U.S. District Court for the Southern District of New York denied the motion and dismissed the suit for lack of subject matter jurisdiction. The U.S. Court of Appeals for the Second Circuit (per Timbers, J.) remanded the case and *held*: that the district court had jurisdiction to hear the case based on a waiver of sovereign immunity.

In March 1980, Proyecfin and BIV entered into a Loan Agreement with a consortium of Middle East banks to obtain financing for the construction of a residential development in Venezuela. Under the agreement, BIV promised to act as guarantor. At the same time, Proyecfin and BIV entered into a Contract of Supervision whereby BIV was responsible for monitoring Proyecfin's work, making progress payments and acting as trustee for all money received and disbursed for the project. The Contract of Supervision was made a condition to the effectiveness of the Loan Agreement. Moreover, the Contract of Supervision expressly incorporated the terms and conditions of the Loan Agreement.

Approximately 4 years later, after some difficulty in receiving disbursements, Proyecfin filed suit in the Supreme Court of New York alleging wrongful refusal of BIV to advance payments due under the contract, breach of fiduciary duty, conversion and wrongful exaction of fees and interest. Following removal to federal district court, the court dismissed the action on the ground that BIV was immune from suit, holding that the waiver clause in the Loan Agreement was not applicable in a suit based on violations of the related Contract of Supervision. Proyecfin appealed.

The court of appeals began by noting that the Loan Agreement between Proyecfin and BIV on the one hand, and the consortium of banks on the other, contained a "Jurisdiction" clause under which "any borrower or guarantor" expressly waived immunity from suit. The court found that this waiver was not limited to disputes under the Loan Agreement, but also applied to actions brought under the Contract of Supervision between BIV and Proyecfin. The court of appeals also rejected BIV's contention that the lending consortium was the sole beneficiary of the waiver provision, observing



that the Loan Agreement "expressly states that its provisions run to the benefit of *all* of the parties to the agreement."<sup>1</sup>

The court then turned to the question whether the district court had jurisdiction under section 1605(a)(1) of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602-1611) (1982)) (FSIA). As in *Verlinden B.V. v. Central Bank of Nigeria*,<sup>2</sup> this case involved a lawsuit between two foreign corporations. Unlike *Verlinden*, where the Supreme Court found jurisdiction under the FSIA, the "transaction upon which the action is based involves activities wholly unrelated to the United States."<sup>3</sup> Although the delinquent payments were to be made through banks located in New York, those payments never occurred. The only other nexus with New York, according to the court, was that BIV consented to litigate in New York, among a number of jurisdictions. Nevertheless, the court found that subject matter jurisdiction existed.

In response to the argument that U.S. courts should not become international claims courts for foreign litigants, the court of appeals stated: "We are not concerned that United States courts will become the courts of choice for local disputes between foreign plaintiffs and foreign sovereign defendants . . . [since] [t]he traditional doctrine of *forum non conveniens* . . . is still applicable in cases arising under the Foreign Sovereign Immunities Act."<sup>4</sup>

The court concluded by affirming the lower court's denial of Proyecfin's motion to have the case returned to New York state court. In this regard, the court noted Congress's intention, as evidenced in the legislative history of the FSIA, to liberalize the removal rules in actions brought against foreign sovereigns. " 'In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts.' "<sup>5</sup>

Perhaps the most significant aspect of the Second Circuit's decision is the court's unwillingness to read into section 1605(a)(1) of the FSIA an implied requirement that there be a nexus between the transaction or events at issue and the United States forum. In the words of Judge Timbers, "We need not decide whether to read such a requirement into the Act since a sufficient nexus exists in this case."<sup>6</sup> If the courts ultimately hold that such a nexus is required, the effect will be to narrow the scope of the FSIA.

*Expropriation—just compensation—political question doctrine—responsibility of U.S. Government for taking of U.S. citizens' property by foreign government*

LANGENEGGER v. UNITED STATES. 756 F.2d 1565.  
U.S. Court of Appeals, Fed. Cir., March 12, 1985.

Plaintiffs, U.S. citizens, brought suit against the United States in the U.S. Claims Court to recover the value of land they had owned in El Salvador

<sup>1</sup> 760 F.2d 390, 394 (emphasis in original).

<sup>2</sup> 461 U.S. 480 (1983), summarized in 77 AJIL 885 (1983).

<sup>3</sup> 760 F.2d at 394.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 397 (quoting H.R. REP. NO. 1487, 94th Cong., 2d Sess. 32, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6631).

<sup>6</sup> 760 F.2d at 394.

that had been expropriated by the Salvadoran Government pursuant to a program of agrarian land reform. Plaintiffs contended that the Salvadoran Government had engaged in a program of expropriation at the prompting of, and on the promise of military and economic support by, the U.S. Government, and that the U.S. Government was therefore responsible for reimbursement under the just compensation clause of the Fifth Amendment to the U.S. Constitution. In the alternative, they argued that the U.S. encouragement of El Salvador's actions caused an extinguishment of their claims under international law, which also amounted to a taking under the Fifth Amendment. The Claims Court granted summary judgment in favor of the United States on the grounds that the claim involved a nonjusticiable political question and that the actions of the U.S. Government did not constitute a taking.<sup>1</sup> The U.S. Court of Appeals for the Federal Circuit (per Nichols, J.) affirmed in part and vacated in part, *holding*: that the case did indeed present a justiciable question, but that the U.S. Government's support of El Salvador's land reform program did not give rise to liability on the part of the United States for an expropriation, and that plaintiffs had failed to demonstrate that their right to proceed before an international forum had been extinguished.

In October 1979, Salvadoran military officers took over the Government of El Salvador and established a revolutionary junta. As part of its program for economic and social change, the new Government promised agrarian land reform. After a period of little progress with the new policy, the U.S. Government urged and supported implementation of the reform program, apparently as a stabilizing measure for the new Government.<sup>2</sup> In March 1980, the Salvadoran Government promulgated Decree No. 153, which provided for expropriation of all agricultural estates over 1,235 acres and conversion of these properties into cooperatives run by those who worked the estates. Owners of the estates were to be compensated with non-negotiable bonds. After plaintiffs' farm was expropriated, plaintiffs brought their claim in federal court.

Relying on *Goldwater v. Carter*,<sup>3</sup> the court identified three principal considerations for determining the application of the political question doctrine: whether the issue involves resolution of questions committed by the Constitution to another branch of government; whether it requires the court to move beyond areas of judicial expertise; and whether prudential considerations counsel against judicial intervention. The court noted that the case raised questions regarding the taking of land and just compensation, which are traditionally resolved by the U.S. judiciary. No delicate issues outside the expertise of the courts were directly involved. As to the prudential considerations, the court found that the issue presented to the Claims Court was in fact a narrow one: whether U.S. involvement in the expropriation

<sup>1</sup> 5 Ct. Cl. 229 (1984), *summarized in* 79 AJIL 135 (1985).

<sup>2</sup> Plaintiffs alleged, and the court accepted for purposes of summary judgment, that the U.S. Government had provided financial aid to El Salvador for the reform program and assisted in drafting the agrarian reform proposals by providing an expert who was under contract to the United States.

<sup>3</sup> 444 U.S. 996, 998 (1979), *summarized in* 74 AJIL 441 (1980).

was sufficiently direct and substantial to warrant a finding that the United States had engaged in a taking. The court did not view the claim as a challenge to the manner in which the U.S. Government conducted foreign relations, the sovereignty of the Salvadoran Government or the propriety of its actions. Accordingly, the court found that none of the prudential considerations warranting judicial restraint was involved.

Turning to the question of just compensation, the court compared the present case to several prior Court of Claims cases concerning "the level of involvement necessary to hold the United States responsible for a foreign-based taking."<sup>4</sup> The court read those decisions as establishing two principal factors for determining the requisite level of U.S. Government involvement: the nature of the U.S. Government's activity and the level of benefit derived by the United States. In *Turney v. United States*,<sup>5</sup> the United States after World War II mistakenly conveyed a military radar system to the Philippine Government, after which the equipment was sold to plaintiffs. Upon discovering the error, the United States sought return of the equipment and exerted pressure on the Philippines to render assistance. When the United States obtained the return of the equipment, the plaintiffs sought judicial relief. The Court of Claims held that plaintiffs could properly allege a taking claim, since the United States had received the benefit of the taking. On the other hand, in *Anglo Chinese Shipping Co. v. United States*,<sup>6</sup> the Supreme Commander of the Allied Powers had ordered Japanese authorities to retain a ship seized from a British shipping company and use it to lay and repair submarine cables. The court held that the United States was not liable for a taking since the Japanese were involved in the outfitting and daily use of the ship and reaped the long-term benefits of its work.

In the instant litigation, as in *Anglo Chinese*, the court found that plaintiffs had failed to demonstrate either the necessary degree of involvement by the U.S. Government or any tangible benefits accruing to the United States. The activities of the United States toward the Salvadoran Government were characterized as "[d]iplomatic persuasion among allies," which was not "sufficiently irresistible to warrant a finding of direct and substantial involvement, however difficult refusal may be as a practical matter."<sup>7</sup> The court also found that the expropriation by the Salvadoran Government primarily benefited its own national interest as perceived by its leaders; the benefit of hemispheric stability accruing to the United States was merely incidental.

Unlike the Court of Claims, the appeals court held that the extinguishment of plaintiffs' claims under international law could indeed amount to a taking. However, the question whether a taking had occurred was presented only

<sup>4</sup> 756 F.2d 1565, 1571 (citing *Turney v. United States*, 115 F.Supp. 457, 126 Ct. Cl. 202 (1953); *Anglo Chinese Shipping Co. v. United States*, 127 F.Supp. 553, 130 Ct. Cl. 361, cert. denied, 349 U.S. 938 (1955); *Best v. United States*, 292 F.2d 274, 154 Ct. Cl. 827 (1961); *Porter v. United States*, 496 F.2d 583, 204 Ct. Cl. 355 (1974), cert. denied, 420 U.S. 1004 (1975)).

<sup>5</sup> 115 F.Supp. 457, 126 Ct. Cl. 202 (1953).

<sup>6</sup> 127 F.Supp. 553, 130 Ct. Cl. 361, cert. denied, 349 U.S. 938 (1955).

<sup>7</sup> 756 F.2d at 1572.

if the claim had in fact been extinguished. In this respect, the court noted that El Salvador had agreed to abide by U.S. laws authorizing international arbitration for claims such as those of the plaintiffs,<sup>8</sup> and that plaintiffs could proceed independently with an arbitration without the assistance or approval of the U.S. Government. In light of these considerations, the court held that an international forum was still available to plaintiffs and that their claim had therefore not been extinguished.

The court's rationale constitutes a straightforward application of Fifth Amendment jurisprudence to reject a novel attempt to expand the financial responsibility of the U.S. Government for its diplomatic activities. The conclusion of the international law discussion suggests that if plaintiffs are able to demonstrate that international adjudication is foreclosed, they may return to court and argue that the United States was responsible for extinguishing their claim. According to the reasoning in the previous section of the opinion, however, plaintiffs would face substantial obstacles in proving that the U.S. Government owed compensation for the taking, for they would still be compelled to prove the same elements that were fatal to their expropriation claim.

*Immigration and naturalization—loss of citizenship—economic duress—specific intent to renounce U.S. citizenship*

RICHARDS v. SECRETARY OF STATE. 752 F.2d 1413.  
U.S. Court of Appeals, 9th Cir., February 4, 1985.

Plaintiff brought suit in the federal district court seeking a declaratory judgment that the procedures used by the Department of State in issuing him a Certificate of Loss of Nationality were unconstitutional and that the Secretary of State's determination in this regard was erroneous. The district court, after conducting a trial *de novo*, found that plaintiff had voluntarily and with specific intent renounced his U.S. citizenship in order to become a citizen of Canada. The U.S. Court of Appeals for the Ninth Circuit (per Reinhardt, J.) affirmed and *held*: that the plaintiff lost his citizenship when he voluntarily became a citizen of Canada and in that process took an oath of allegiance which contained an explicit renunciation of U.S. citizenship.

Plaintiff, a U.S. citizen by birth, left the United States in 1965 and established residence in Vancouver, Canada, where he taught school until 1969. At that time, he applied for employment with the Boy Scouts of Canada. As a necessary condition of employment, Richards declared his intention to become a Canadian citizen. Two years later, he became a Canadian citizen and signed a "Declaration of Renunciation and Oath of Allegiance."<sup>1</sup>

<sup>8</sup> See Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, Title II, 97 Stat. 384 (1983).

<sup>1</sup> The declaration read as follows:

I hereby renounce all allegiance and fidelity to any foreign sovereign or state of whom or which I may at this time be a subject or citizen. I swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors,

thorizing or implementing legislation, "an individual may enforce a treaty's provisions only when it is self-executing, i.e., when it expressly or impliedly provides a private right of action."<sup>3</sup> For purposes of determining whether these treaties were self-executing, the court considered four factors: "[1] the purposes of the treaty and the objectives of its creators, [2] the existence of domestic procedures and institutions appropriate for direct implementation, [3] the availability and feasibility of alternative enforcement methods, and [4] the immediate and long-range social consequences of self- or non-self-execution."<sup>4</sup> The court noted that the Geneva Convention expressly provided for implementation through municipal law. Although the Hague Convention was silent on this point, the court concluded that construing the Convention as self-executing would "create insurmountable problems for the legal system that attempted it; would potentially interfere with foreign relations; and would pose serious problems of fairness in enforcement."<sup>5</sup> On these grounds, the court held that neither the Geneva Convention nor the Hague Convention establishes judicially enforceable obligations.

The court then turned to plaintiffs' claims for relief based on alleged violations of customary international law. Plaintiffs contended that because international law is part of federal common law, the court should find an explicit or implicit right of action for its enforcement. The court identified three possible sources for such a private right of action: "an explicit grant of authority under 28 U.S.C. §1331; an implicit right derived from the law of nations; or an implicit right derived from federal common law."<sup>6</sup>

The court observed that, unlike 28 U.S.C. §1350 (the Alien Tort Claims Act), section 1331 did not, standing alone, grant plaintiffs a cause of action. Furthermore, such a cause of action could not be inferred from the law of nations: "While international law may provide the substantive rule of law in a given situation, the enforcement of international law is left to individual states."<sup>7</sup> In the absence of affirmative legislative action evincing intent to give effect to international law, the court was reluctant to infer such intent solely from U.S. membership in the community of nations. Moreover, the court determined that even if it had jurisdiction over plaintiffs' international law claims, plaintiffs had failed to state an actionable claim pursuant to Federal Rule of Civil Procedure 12(b)(6) because too many years had passed since the occurrence of the allegedly illegal acts.

Finally, the court considered whether plaintiffs' cause of action stated a cognizable claim for relief under Yugoslavian law. This depended in part on whether California's or Yugoslavia's statute of limitations was applicable.

<sup>3</sup> 601 F.Supp. 1421, 1425 (relying on *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), summarized in 78 AJIL 668 (1984), cert. denied, 105 S.Ct. 1354 (1985); and *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir.), cert. denied, 429 U.S. 835 (1976)).

<sup>4</sup> 601 F.Supp. at 1425 (quoting *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975)).

<sup>5</sup> 601 F.Supp. at 1425.

<sup>6</sup> *Id.* at 1426.

<sup>7</sup> *Id.* at 1427.

The court followed the traditional choice-of-law approach, which dictates that statutes of limitations concern procedural matters and therefore are governed by the law of the forum. Accordingly, the court determined that California's statute of limitations, under which plaintiffs' claim was time-barred, should be applied.<sup>8</sup> The court also noted that, even if the Yugoslavian statute of limitations were to apply, it could not be enforced because it "runs afoul of the constitutional ban on ex post facto laws" and "would violate fundamental notions of fairness under international law."<sup>9</sup>

The court's holding that 28 U.S.C. §1331 does not provide U.S. citizens with a private right to sue for violations of the law of nations sets up a curious dichotomy in U.S. law. In *Filartiga v. Pena-Irala*,<sup>10</sup> the Second Circuit held that 28 U.S.C. §1350 (the Alien Tort Claims Act) provided a basis for aliens to bring actions in U.S. federal courts for torts committed in violation of the law of nations. The district court's holding in *Handel v. Artukovic* appears to mean that U.S. federal courts have jurisdiction to hear the claims of aliens more readily than they do the claims of U.S. citizens.

*Jurisdiction—international antitrust—right of foreign citizens to petition their government for redress of grievances—comity*

LAKER AIRWAYS LTD. v. PAN AMERICAN WORLD AIRWAYS, INC. 604 F.Supp. 280.  
U.S. District Court, D.D.C., December 20, 1984.

Plaintiff, Laker Airways Limited, filed suit in U.S. federal court against four American defendants and eight foreign airlines, including British Airways Board Ltd. and British Caledonian Airways, alleging violations of the U.S. antitrust laws and conspiracy to monopolize air travel between New York and Great Britain and to drive plaintiff out of business. Plaintiff sought an injunction to restrain the UK defendants from petitioning the UK Government for legislation prohibiting plaintiff from pursuing its lawsuit. The U.S. District Court for the District of Columbia (per Harold H. Greene, J.) denied plaintiff's motion and *held*: that although it had authority to enjoin the defendants from petitioning the UK Government in order to protect its jurisdiction, the court should refrain from exercising that power in light of the significant interest of the United Kingdom in the political rights of its subjects.

Plaintiff's suit precipitated various steps by a number of the original defendants to avoid the jurisdiction of the U.S. courts. The UK defendants, for example, succeeded in obtaining an injunction from the British High Court of Justice prohibiting plaintiff, a UK subject, from taking any further steps to prosecute its claims against them in U.S. courts. Plaintiff subsequently

<sup>8</sup> The court distinguished the Seventh Circuit decision in *Kalmich v. Bruno*, which construed the same Yugoslavian statute and held that the Yugoslavian rather than the Illinois statute of limitations applied, 553 F.2d 549 (7th Cir.), *cert. denied*, 434 U.S. 940 (1977).

<sup>9</sup> 601 F.Supp. at 1436-37.

<sup>10</sup> 630 F.2d 876 (2d Cir. 1980), *summarized in* 75 AJIL 149 (1981).

sought injunctive relief from the U.S. district court to preclude the remaining non-UK defendants from attempting to obtain similar foreign court orders. The district court granted plaintiff's request and enjoined the remaining defendants from taking any action "in a foreign court or otherwise" that would interfere with the plaintiff's prosecution of its claims or the court's jurisdiction to adjudicate those claims.<sup>1</sup>

In the meantime, the British Court of Appeal issued a permanent injunction prohibiting plaintiff from filing papers with the U.S. district court and ordering plaintiff to take action to dismiss the UK defendants.<sup>2</sup> This injunction, however, was dissolved by the British House of Lords.<sup>3</sup> Plaintiff immediately sought an order from the U.S. district court similar to the order previously entered against the non-UK defendants. The district court granted plaintiff's request on a temporary basis in order to protect its jurisdiction pending argument and briefs of the parties.

Defendants argued that the "or otherwise" language of the court's injunction impermissibly prohibited them from petitioning the UK Government for relief. Defendants contended that their right to petition the Government was protected by (1) the First Amendment to the U.S. Constitution, (2) accepted norms of international law, (3) principles of international comity.

With respect to the defendants' First Amendment claim, the district court found no constitutional violation. Although the court acknowledged that it could not prevent a party from petitioning the U.S. Government for such relief, the court found no authority for extending the First Amendment's protections to aliens abroad:

[N]o court has held—at least no decision has been cited to this Court and the Court has found none—that a United States tribunal is compelled by the First Amendment to protect an alien's desire to speak in a foreign country or to petition the governmental authorities of a foreign nation.<sup>4</sup>

The court stated:

Congress, because it makes the laws under which this Court operates, would be exercising legitimate power were it to pass legislation with respect to these laws, while the Parliament—which has no role with respect either to United States substantive law or to federal court jurisdiction—would be improperly interfering with the jurisdiction of what to it is a foreign court. Needless to say, the principle operates equally in reverse. Thus, the Congress could not arrogate to itself the power to interfere with the legitimate jurisdiction of a British court by enacting legislation prohibiting either that court or the plaintiff before it from proceeding;

<sup>1</sup> See 604 F.Supp. 280, 283 (emphasis added) (referring to the order accompanying the court's opinion in *Laker Airways Ltd. v. Pan American World Airways*, 559 F.Supp. 1124 (D.D.C. 1983), *aff'd*, 731 F.2d 909 (1984), *summarized in* 78 AJIL 666 (1984)).

<sup>2</sup> *British Airways Board v. Laker Airways Ltd.*, [1983] 3 W.L.R. 544 (C.A.).

<sup>3</sup> *British Airways Board v. Laker Airways Ltd.*, [1984] 3 W.L.R. 413 (H.L.), *summarized in* 79 AJIL 141 (1985).

<sup>4</sup> 604 F.Supp. at 287.

and if it attempted nevertheless to do so, the British courts would not be bound to respect its status or its interference.<sup>5</sup>

Further, the court found that the constitutional right to freedom of speech does not protect speech designed to interfere with the court's exercise of jurisdiction. In this regard the court noted that defendants sought a foreign directive that would deny plaintiff its constitutional guarantees of due process of law and equal protection.

Defendants argued that international agreements such as the Universal Declaration of Human Rights<sup>6</sup> and the Helsinki Accords<sup>7</sup> protected their right to petition their government. The district court rejected the notion that international law provides defendants with broader rights than U.S. and UK law, reiterating its concern with defendants' intent to interfere with the legitimate exercise of the court's jurisdiction.

As for defendants' comity argument, the court noted that in an earlier decision in this case, the U.S. Court of Appeals for the District of Columbia Circuit upheld the antisuit injunction, finding that comity does not compel a court to relinquish its jurisdiction particularly when, to do so, would contravene U.S. policy against anticompetitive behavior.<sup>8</sup> The district court reaffirmed the antisuit injunction preventing defendants from pursuing a foreign court action but agreed to strike the words "or otherwise" from the injunction in light of the interest of the United Kingdom in the political rights of its subjects. The court declined to exercise its authority to prohibit defendants' proposed legislative approach to the UK Parliament, noting its confidence "that the British Parliament and the British executive authorities will not act in a manner at odds with their own obligations under the law of nations and under comity principles."<sup>9</sup>

This case is but one more chapter in the continuing battle between Laker Airways and various defendant airlines charged by Laker with anticompetitive practices. As in past proceedings, this battle has brought U.S. and UK courts into conflict. The court's rationale and handling of this very novel question avoids, for the present, an escalation of the conflict. The court has made clear its intention to proceed with this litigation regardless of any attempt by the UK Parliament or executive authorities to interfere with the court's jurisdiction over Laker's antitrust suit. However, the court properly noted the overarching need under international law and comity for restraint by the UK Government.

<sup>5</sup> *Id.* at 290 (footnote omitted) (emphasis in original).

<sup>6</sup> GA Res. 217A, UN Doc. A810, at 71 (1948).

<sup>7</sup> Conference on Security and Cooperation in Europe: Final Act, 73 DEP'T ST. BULL. 323 (1975), reprinted in 14 ILM 1292 (1975).

<sup>8</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), summarized in 78 AJIL 666 (1984). The court of appeals had been unpersuaded by defendants' previous pleas of comity, burdened as they were with the failure of the UK courts to accord comity to the actions of the U.S. courts.

<sup>9</sup> 604 F.Supp. at 294.



## CURRENT DEVELOPMENTS

### THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY

After 6 years of study by a special subcommittee<sup>1</sup> and 2 additional years of revision by the full Committee on the Enforcement of Human Rights Law,<sup>2</sup> the 61st Conference of the International Law Association, held in Paris from August 26 to September 1, 1984, approved by consensus a set of minimum standards governing the declaration and administration of states of emergency that threaten the life of a nation, including 16 articles setting out the nonderogable rights and freedoms to which individuals remain entitled even during states of emergency.<sup>3</sup>

These standards, designated the Paris Minimum Standards of Human Rights Norms in a State of Emergency, are intended to help ensure that, even in situations where a bona fide declaration of a state of emergency has been made, the state concerned will refrain from suspending those basic human rights which are regarded as nonderogable under Article 4 of the International Covenant on Civil and Political Rights,<sup>4</sup> Article 15 of the European Convention on Human Rights<sup>5</sup> and Article 27 of the American Convention on Human Rights.<sup>6</sup>

The Paris Standards build upon earlier studies of the above nonderogation articles by Judge Buergenthal,<sup>7</sup> Professor Hartman<sup>8</sup> and Professor Higgins.<sup>9</sup>

<sup>1</sup> Chaired by Mr. Subrata Roy Chowdhury of India.

<sup>2</sup> Chaired by the undersigned, with members from Australia, Bangladesh, Bulgaria, Canada, Finland, the Federal Republic of Germany, Ghana, Guyana, Hungary, India, Japan, the Republic of Korea, Nepal, the Netherlands, Nigeria, the Philippines, Sweden, Switzerland, the United Kingdom, the United States and Yugoslavia.

<sup>3</sup> The committee's report and draft minimum standards will be published in the *Report of the 61st Conference* (Paris). The minimum standards as approved are identical with the committee's draft, save for the deletion of proposed Article 11(4), which had provided that "each family shall be entitled to at least one child."

<sup>4</sup> Adopted Dec. 16, 1966, GA Res. 2200 (XXI), 21 UN GAOR, Supp. (No. 16) at 52, UN Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

<sup>5</sup> Nov. 4, 1950, 213 UNTS 222 (entered into force Sept. 3, 1953).

<sup>6</sup> American Convention on Human Rights, opened for signature Nov. 22, 1969 (entered into force July 18, 1978), reproduced in ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/II.60, Doc. 28, at 29 (1983), and INTERNATIONAL HUMAN RIGHTS INSTRUMENTS §170.1 (R. Lillich ed. 1985).

<sup>7</sup> Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72 (L. Henkin ed. 1981).

<sup>8</sup> Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1 (1981).

<sup>9</sup> Higgins, *Derogations under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1976-77).

They also take into account the contributions made by Nicole Questiaux<sup>10</sup> and Erica-Irene Daes,<sup>11</sup> special rapporteurs of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and a recent publication of the International Commission of Jurists, *States of Emergency*.<sup>12</sup> They should be of considerable help to governments, international monitoring bodies and nongovernmental organizations concerned with the meaning, scope and effect of such treaty obligations.<sup>13</sup>

The Paris Standards are as follows:

MINIMUM STANDARDS OF HUMAN RIGHTS NORMS  
IN A STATE OF EMERGENCY

SECTION (A) EMERGENCY: DECLARATION, DURATION AND CONTROL

1. (a) The existence of a public emergency which threatens the life of the nation, and which is officially proclaimed, will justify the declaration of a state of emergency.

(b) The expression "public emergency" means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.

2. The constitution of every state shall define the procedure for declaring a state of emergency; whenever the executive authority is competent to declare a state of emergency, such official declaration shall always be subject to confirmation by the legislature, within the shortest possible time.

3. (a) The declaration of a state of emergency shall never exceed the period strictly required to restore normal conditions.

(b) The duration of emergency (save in the case of war or external aggression) shall be for a period of fixed term established by the constitution.

(c) Every extension of the initial period of emergency shall be supported by a new declaration made before the expiration of each term for another period to be established by the constitution.

(d) Every extension of the period of emergency shall be subject to the prior approval of the legislature.

4. The declaration of a state of emergency may cover the entire territory of the state or any part thereof, depending upon the areas actually affected by the circumstances motivating the declaration. This will not prevent the

<sup>10</sup> Questiaux, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, UN Doc. E/CN.4/Sub.2/1982/15 (1982).

<sup>11</sup> Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, UN Doc. E/CN.4/Sub.2/432/Rev.2 (1983).

<sup>12</sup> INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS (1983).

<sup>13</sup> At present, the committee has embarked upon a 4-year study of the international monitoring of states of emergency. This study, intended to determine how international bodies can protect more effectively the basic human rights of individuals set forth in the Paris Standards, is being conducted by the committee's rapporteur, Prof. Hartman, under the direction of the undersigned.

extension of emergency measures to other parts of the country whenever necessary nor the exclusion of those parts where such circumstances no longer prevail.

5. The legislature shall not be dissolved during the period of emergency but shall continue to function; if dissolution of a particular legislature is warranted, it shall be replaced as soon as practicable by a legislature duly elected in accordance with the requirements of the constitution, which shall ensure that it is freely chosen and representative of the entire nation.

6. (a) The termination of a state of emergency shall be automatic upon the expiration of a given term without prejudice to the right of express revocation before such expiry to be exercised by the executive or the legislature, as the case may be.

(b) Upon the termination of an emergency there shall be automatic restoration of all rights and freedoms which were suspended or restricted during the emergency and no emergency measures shall be maintained thereafter.

7. At the regional or international level, every declaration of emergency by a state party to a regional or international human rights treaty shall be subject to such judicial or other review as the terms of the particular treaty may provide; while, at the national level, such power of review shall be exercised in terms of the constitution and legal tradition of the state concerned, keeping in view the undertaking of the state to adopt legislative or other measures to give effect to the rights recognized by any treaty to which it may be a party.

#### SECTION (B) EMERGENCY POWERS AND THE PROTECTION OF INDIVIDUALS: GENERAL PRINCIPLES

1. During the period of the existence of a public emergency the state concerned may take measures derogating from its obligations to respect and ensure to all individuals within its territory and subject to its jurisdiction the human rights and fundamental freedoms internationally recognized, but it may not derogate from internationally prescribed rights which are by their own terms "nonsuspendable" and not subject to derogation.

2. The power to take derogatory measures as aforesaid is subject to five general conditions:

(a) Every state which is a party to a regional or international human rights treaty shall comply with the principle of notification as may be prescribed by the particular treaty.

(b) Such measures must be strictly proportionate to the exigencies of the situation.

(c) Such measures must not be inconsistent with the other obligations of the state under international law.

(d) Such measures must not involve any discrimination solely on the ground of race, colour, sex, language, religion, nationality or social origin.

(e) The basic rights and freedoms guaranteed by international law shall remain non-derogable even during emergency. As the minimum, the constitution shall provide that the rights recognized as non-derogable in international law may not be affected by a state of emergency.

3. While assuming or exercising emergency powers every state shall respect the following principles:

(a) The fundamental functions of the legislature shall remain intact despite the relative expansion of the authority of the executive. Thus, the legislature shall provide general guidelines to regulate executive discretion in respect of permissible measures of delegated legislation.

(b) The prerogatives, immunities and privileges of the legislature shall remain intact.

(c) The guarantees of the independence of the judiciary and of the legal profession shall remain intact. In particular, the use of emergency powers to remove judges or to alter the structure of the judicial branch or otherwise to restrict the independence of the judiciary shall be prohibited by the constitution.

4. (a) All emergency measures in derogation of the rights of individuals shall be supported by the authority of law as enacted by the duly elected representatives of the people.

(b) As far as practicable, norms to be applied during an emergency shall be formulated when no emergency exists.

(c) States shall review and, if necessary, revise the emergency measures (legislative or executive) from time to time to ensure reasonable guarantees against any abusive exercises of emergency powers.

5. The judiciary shall have the power and jurisdiction to decide: firstly, whether or not an emergency legislation is in conformity with the constitution of the state; secondly, whether or not any particular exercise of emergency power is in conformity with the emergency legislation; thirdly, to ensure that there is no encroachment upon the non-derogable rights and that derogatory measures derogating from other rights are in compliance with the rule of proportionality; and fourthly, where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect. A court of law shall have full powers to declare null and void any emergency measure (legislative or executive) or any act of application of any emergency measure which does not satisfy the aforesaid tests.

SECTION (C) NON-DEROGABLE RIGHTS AND FREEDOMS—  
DRAFT ARTICLES 1-16

Article 1: Right to Legal Personality

1. Everyone shall have the right to recognition everywhere as a person before the law.

2. The inherent dignity of the human person shall be respected.

3. Every person has the right to have his physical, mental and moral integrity respected.

Article 2: Freedom from Slavery or Servitude

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

## Article 3: Freedom from Discrimination

1. All persons are equal before the law and are entitled without discrimination to the equal protection of the law.
2. There shall be no discrimination solely on ground of race, colour, sex, language, religion, nationality or social origin.

## Article 4: Right to Life

1. Every person has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his right to life.
2. In a country where the death penalty does not exist it shall not be introduced as an emergency measure.
3. In a country where the death penalty exists, it may be imposed, even during emergency, only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and pursuant to a final judgment rendered by a competent court.
4. In no case shall the death penalty be imposed for political offences or related common crimes.
5. The death penalty shall not be imposed upon any person who, at the time of commission of the crime, was under 18 years of age or over 70 years of age. Women when pregnant or mothers of young children shall never be executed.
6. Every person sentenced to death shall have the right to apply for amnesty, pardon or commutation of the sentence which may be granted in all cases. No sentence of death shall be executed while a petition for such relief is pending before the competent court or authority.
7. Every state shall remain fully accountable for every enforced or involuntary disappearance of an individual within its jurisdiction occasioned by an act or omission of the state. With a view to preventing the inhuman and criminal practice of disappearances which may lead to illegal or arbitrary deprivation of the right to life, every state shall:
  - (a) maintain central registers or records to account for all persons that have been detained, so that their relatives and other interested persons may promptly learn of any arrests that may have been made;
  - (b) guarantee that such detention shall be made only by competent and duly identified authorities as may be prescribed by law or regulations;
  - (c) guarantee that the persons so detained shall be kept in premises which afford every possible safeguard as regards hygiene and health.

## Article 5: Right to Liberty

1. No one shall be deprived of his right to liberty and security of the person except on such grounds and in accordance with such procedures as are established by law.
2. Any law providing for preventive or administrative detention shall secure the following minimum rights of the detainee:
  - (a) The right to be informed, within seven days, of the grounds of his

detention; however, disclosure of such facts in support of the grounds as the detaining authority considers to be prejudicial to the public interest need not be made to the detainee, without prejudice to the power of the reviewing authority in its discretion to examine *in camera* such facts if it considers it necessary in the interests of justice.

(b) The right to communicate with, and consult, a lawyer of his own choice, at any time after detention.

(c) The right to have his case reviewed within 30 days from the date of his detention by a judicial or quasi-judicial body constituted in accordance with the procedures designed to make such guarantees effective.

(d) No person shall be detained for a period longer than 30 days unless the reviewing authority before its expiry has reported that there is in its opinion sufficient cause for such detention.

(e) Even if the reviewing authority reports that in its opinion there is sufficient cause for a person's detention, such detention shall not be continued beyond a period of one year. If, however, circumstances then prevailing warrant detention, the detaining authority may, subject to the same conditions and safeguards, order further detention of such person.

(f) Regular visits by the members of the family of the detainee shall be permitted.

(g) The detainee shall be treated with humanity and respect for the inherent dignity of the human person and, in any event, such treatment, consistent with security, shall not be less favourable than that afforded to convicted prisoners.

(h) The names of the detainees with the dates of their orders of detention shall be published in an official gazette; the names of persons released should be similarly published, with the dates of their release.

3. In every case of detention without trial, during an emergency, the remedy of *habeas corpus* (or *amparo*) must be available to the detainee at least for the limited purpose of ensuring the supervisory jurisdiction of a competent court of law in five respects:

(a) for determination whether the relevant law of preventive or administrative detention is in compliance with the relevant constitutional requirements;

(b) whether the order of detention is in compliance with the law of preventive or administrative detention;

(c) whether the detainee is the person against whom the order of detention was issued and whether the order was made *mala fides* or in violation of natural justice;

(d) for ensuring that every detainee is treated with humanity and with respect by directing, *inter alia*, his medical examination and inspection of the prison or place of detention; and

(e) for ensuring that the minimum rights of the detainee mentioned in the preceding paragraphs are duly implemented by the detaining authority.

#### Article 6: Freedom from Torture

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

2. Every state shall, in accordance with the provisions of the 1975 United Nations Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction.

3. In particular, in the context of the principles recognized in the said 1975 Declaration, every state shall:

(a) ensure that acts of torture as defined in article 1 are offences under its criminal law as enjoined by article 4;

(b) frame general rules or instructions with regard to the training, functions, duties and requirements of law enforcement personnel and other public officials who are involved in the detention and interrogation of all persons deprived of their liberty (article 5);

(c) review systematically the interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty (article 6);

(d) conduct an impartial investigation by a competent authority whenever there is reason to believe that any act prohibited as aforesaid has been committed, whether or not a formal complaint is received (articles 8 and 10);

(e) institute criminal, disciplinary or other appropriate proceedings against the alleged offender or offenders if investigation establishes that such offence is suspected of having been committed (articles 9 and 10);

(f) afford appropriate compensation to the victim in accordance with national law (article 11) and inflict adequate punishment for the offender or offenders proved guilty;

(g) declare as inadmissible evidence, in any proceedings against the person concerned, any statement obtained as a result of an act prohibited as aforesaid.

4. The law of evidence shall not be amended so as to give additional incentives for obtaining confessions.

5. Every detainee shall be examined by a doctor soon after his arrest and his physical and mental condition duly recorded and signed by the doctor; thereafter periodical medical examinations shall be held and records thereof duly maintained. The detainee shall have the opportunity at all times to consult a doctor of his own choice.

6. With regard to the procedures for interrogation, every person in detention shall be entitled to the following minimum guarantees:

(a) all persons participating in interrogation shall be duly identified;

(b) rules shall be framed limiting the hours during which interrogation may occur and records shall be kept of all periods of interrogation with the names of all persons present;

(c) interrogation shall be subject to direct supervision by superior officers, and shall occur in conditions which permit this control to be exercised.

7. The establishment or infliction of such punishment as summary executions by firing squads, public hangings, floggings, the amputation of limbs and other cruel, inhuman or degrading forms of punishment are gross violations of international standards of humane treatment.

### Article 7: Right to Fair Trial

Everyone charged with a penal offence shall be entitled to the following minimum guarantees of fair trial in full equality and without discrimination:—

1. The right to be informed promptly and in detail of the charge against him;

2. The right to have adequate time and facilities for the preparation of one's defence. This right shall include: (a) at least minimum communication with a counsel of one's own choice, and (b) the right of an indigent defendant to have free legal assistance in every case where the interests of justice so require;

3. The right to be present at one's trial, which should be conducted in a language comprehensible to the defendant;

4. Such trial should be held in public but, if attendance at such trial is restricted in any way, such restrictions shall not apply to the members of the family of the defendant;

5. The defendant has the right to be presumed innocent until proved guilty according to law;

6. No one shall be held guilty of any criminal offences on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

7. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations;

8. No person shall be prosecuted and punished for the same offence more than once, or for a similar offence based upon the same facts that has resulted in a conviction or acquittal;

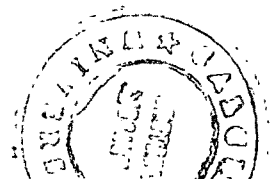
9. No person accused of any offence shall be compelled to be a witness against himself;

10. Any establishment of a criminal offence or infliction of a punishment based on general principles arising out of religious or other sources, which contravene the aforesaid basic norms, shall be considered a gross violation of international law;

11. Every person has a right to be tried by a tribunal which offers the essential guarantees of independence and impartiality;

12. The right to appeal shall always be guaranteed;

13. The right to obtain attendance and examination of defence witnesses shall never be denied; nor shall the right to cross-examine all witnesses who appear at the trial, or to test the veracity of the evidence of those persons who do not attend or appear at the trial, ever be denied.





### Article 8: Freedom of Thought, Conscience and Religion

1. Everyone has the right to freedom of thought, conscience and religion; freedom of religion includes the right to hold any religion or belief or none and to change his religion or belief, and freedom, either alone or in community with others, in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair the freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, public order, health or morals or the fundamental rights and freedoms of others.

4. Every state shall respect the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

5. Nothing in this article shall be construed to deny to any person the right to hold no religious beliefs.

### Article 9: Freedom from Imprisonment for Inability to fulfil a Contractual Obligation

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

### Article 10: Rights of Minorities

1. Persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion, or to use their own language.

2. Advocacy of national, racial, religious or linguistic hatred that constitutes an incitement to discrimination or violence, shall be prohibited by law.

### Article 11: Rights of the Family

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental unit of society and is entitled to protection by society and the state.

### Article 12: Right to a Name

Every person has the right to a given name and the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names, if necessary.

### Article 13: Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state.

## Article 14: Right to Nationality

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

## Article 15: Right to Participate in Government

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

## Article 16: Right to a Remedy

1. The institution of an independent and impartial judiciary is essential for ensuring the rule of law, particularly in time of emergency.
2. Judicial guarantees essential for the protection of the rights aforesaid must be secured by every state in its constitution or by law.
3. All ordinary remedies as well as special ones, such as *habeas corpus* or *amparo*, shall remain operative during the period of emergency with a view to affording protection to the individual with respect to his rights and freedoms which are not or could not be affected during the emergency, as well as other rights and freedoms which may have been attenuated by emergency measures.
4. Civil courts shall have and retain jurisdiction over all trials of civilians for security or related offences; initiation of any such proceedings before or their transfer to a military court or tribunal shall be prohibited. The creation of special courts or tribunals with punitive jurisdiction for trial of offences which are in substance of a political nature is a contravention of the rule of law in a state of emergency.

RICHARD B. LILLICH\*

\* Of the Board of Editors.

## BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

*Peacetime Unilateral Remedies: An Analysis of Countermeasures.* By Elisabeth Zoller. Dobbs Ferry: Transnational Publishers, Inc., 1984. Pp. xviii, 196. Index. \$35, cloth.

From the days of "big sticks" to the days of big bombs, international legal scholarship has devoted relatively little attention to what Lung-chu Chen has called "minor coercions":<sup>1</sup> purposive behavior by an actor in international politics that (1) is designed to and in fact limits the ambit of choice of a target or raises the price of its exercise, but (2), because of the reduced quantum and intensity of the violence involved and the residual network of peaceful relationships that continue to operate between the parties, cannot be characterized as aggression, breach of or threat to the peace and hence rarely reaches the threshold of international review. Coercions such as these, varying in their intensity, frequency of application and scope, are constantly used in international politics, sometimes to secure compliance with norms, sometimes to secure changes in norms and sometimes as a coordinate technique in negotiation. While not all such minor coercions are lawful, it would be quite futile to contend that all are prohibited by Article 2(4) of the UN Charter.

In this broad field, Elisabeth Zoller addresses herself to "countermeasures" in peacetime, a conception given recent currency by both the International Law Commission and the U.S.-French tribunal in the *Air Service Agreement* arbitration (1978). The latter case is discussed in some detail in the book and the text of the award is contained in an appendix. The term "countermeasure" is, it may be noted, normatively ambiguous, for it refers simultaneously to events and to a normative judgment about them, a problem only partially addressed by the use of the term "peacetime unilateral remedies."

Zoller divides her essay into two parts. The first explores in broad terms the legal concept of countermeasures. The second, called the "legal framework of countermeasures," explores the norms regarding substance and conditions for their application. According to Zoller, countermeasures are unilateral in form and remedial. Their use in a normative context does not, she insists, imply that the normative network is being terminated unilaterally, but only that it is being suspended. The general policy underlying the doctrine of *inadimplenti non est adimplendum* is important here, for there is an intuitive justice in discharging a party from the obligation of performance

<sup>1</sup> 9 Chen, *The Legal Regulation of Minor International Coercion* (JSD diss. Yale 1964).

of a contract when the other party has not performed, while viewing the contract itself as suspended but not terminated. But the application of the doctrine to asynallagmatic as well as multilateral agreements, and even more to customary law, takes the intuitive justice of the doctrine—"so just, so equitable, so universally recognized," as Anzilotti put it<sup>2</sup>—to the breaking point.

Here, as elsewhere, intuition can be a misleading guide. Perhaps more attention should be given to the contextual differences between a domestic arena in which a court or tribunal of compulsory jurisdiction can review the *exceptio* and the public international system whose competence does not extend that far. In the latter, the *exceptio non adimpleti contractus* takes on a different character if the party invoking it is also judge and jury of the other party's nonfeasance. In a decentralized system, useful and fair doctrines such as these (and others such as "material" breach and even *jus cogens*) sometimes acquire pathological potentials, for they may actually enervate the structure of agreement if careful attention is not given to the policies they are supposed to serve and the processes of decision in which they transpire.

In part for these reasons, countermeasures excite disquiet in international law. Zoller believes that "international law does indeed, provide safeguards" (p. 81). "There are legal principles applicable to the substances of these measures, i.e. rules stating which international obligations may or may not be the subject of a dispensation, and which dispensations may or may not be opposed" (*id.*). But the illumination of those "safeguards" is brief, necessarily so, one appreciates, given the size of the essay; questions are supplied but relatively few methods for answering them are proffered. Thus,

[t]hese limits may depend on the legal status of the subjects of law, and one may allocate countermeasures to states and sanctions to international organizations. They may depend on the origin of the international obligation, and one may single out single conventional obligations which *per se* will rule out any resort to countermeasures. They may depend on the fundamental character of the norm, and countermeasures may be regarded as excluded in relation to norms of *jus cogens*. They may depend, finally, on the object and purpose of the countermeasures themselves, and one may allow countermeasures to any subject of international law in relation to any kind of obligation, as long as they seek legitimate reparation within the limits of proportionality [p. 138].

But one problem with a rule framework is that it is not clear who will decide, who will *control* the quantum of coercion involved and the contingency for its application. Zoller's treatment of the "rules" might have been strengthened by an examination of the aggregate international decision process that reviews the lawfulness of particular uses of violence. That inquiry might, in turn, have raised some questions about the actual degree of unilaterality of countermeasures. In an interdependent system, so-called unilateral actions

<sup>2</sup> Dissenting opinion of Judge Anzilotti in *Diversion of Water from the Meuse* (Neth. v. Belg.), 1937 PCIJ, ser. A/B, No. 70, at 50 (Judgment of June 28).

may require some consultation with other elites who have not been targeted but whose passive cooperation may be necessary, especially if they may suffer secondary deprivations by "fallout" from the measures. That process of consultation may constitute an international review process, part of whose considerations will include the question of lawfulness.

This is a challenging essay, tightly reasoned and richly documented, by a young scholar plainly moving toward an original conception of international law. It draws skillfully on the literature and case law of Western Europe and North America. But, without minimizing the admiration expressed, this reviewer encountered some problems. There is no explicit treatment of the world power process and it is sometimes difficult to discern a conceptual integration of authority and control. Nor is there an explicit statement of goals or policies and, consistent with them, guidelines for designing appropriate countermeasures or gauging their lawfulness in context. The book tends to view international law in static terms, thereby overlooking the complex problem of assessing lawfulness of the common use of norm violations to initiate changes in law or to accelerate those under way, even when the law under stress is expressed or reflected in bilateral agreements. The essay appears to define the object of countermeasures as remedial, on theoretical rather than empirical grounds. It would appear that resort to minor coercions is not infrequently taken, less with the expectation that the law violator will repair its ways and more as a way of raising the cost of the violation, deterring others who may believe that the norm is in the process of erosion, quelling internal bureaucratic needs or satisfying domestic audiences.

W. MICHAEL REISMAN  
*Board of Editors*

*Visions of World Order: Between State Power and Human Justice.* By Julius Stone. Baltimore and London: The Johns Hopkins University Press, 1984. Pp. xxix, 246. Index. £23.55; \$26.50.

This little book is dedicated to the grandchildren of the author "in the hope that their world grows safer and more peaceful than now appears." The world that now appears to Professor Julius Stone is fraught with peril and foreboding. He is a realist and a skeptic, and as he explores the relevance of international law to the human demands, expectations and aspirations of today, his piercing eye is suffused with paradoxes and perplexities. As he analyzes the visions of world order advanced by other leading scholars of international law, he finds their perspectives clouded by wishfulness and confusion. Stone prefers to describe the world as it is rather than as it ought to be. His critical views are courageously expressed in this erudite study of broad and profound scope. It merits serious and respectful consideration by all who are concerned with the problems of world peace.<sup>1</sup>

<sup>1</sup> The author was awarded the Certificate of Merit of the American Society of International Law in April 1985 for his book's "pre-eminent contribution to creative scholarship."

Stone acknowledges that law is made by humans and for humans and that a global community of human beings is "devoutly to be desired" (p. xiv). But the attainment of an international order governed by acceptable law is seen as a vain hope. Rejecting the analogy of domestic societies, he points to the ambiguities and inadequacies of existing international law and judicial decisions. He feels that the arrogance of sovereignty will prevent nations from surrendering their stockpiles of weapons and will cause them to adhere to their traditional insistence upon being the sole judge in their own cause.

The distinguished author notes the paradoxes and perplexities that mar the contemporary visions of world order. Nations that have recognized their interdependence still confront each other with the threat of nuclear annihilation. Any possibility of "endowing some Olympian authority with predominant military power" (p. xii) is ruled out; even if it could be found, it would have to threaten nuclear destruction, which we are trying to escape. Devastation caused by nuclear weapons would violate the rules of war that prohibit indiscriminate attacks on civilians; the strategy of Mutual Assured Destruction (of civilian populations) is therefore illegal, although the security of the human race may depend upon it. Arms reduction is as fraught with risk as the arms race itself, for in the absence of reciprocity it may increase vulnerability. The prospects of disciplining state entities by the establishment of an international criminal court are blocked by the states themselves, hence preserving their immunity. Communications remain under the domination of the state, which means that they do not widen the range of human understanding but undermine it. Dictatorships that prevent criticism are strengthened by the criticism that democracies permit against themselves.

In challenging the views of three other profound thinkers, Stone rejects as utopian the thesis of C. Wilfred Jenks that the world is moving toward a "Common Law of Mankind." He notes the continuing clash of ideologies and economic interests as well as the competition for military power. Although he shares the aspirations of Jenks, Stone's analysis does not allow his mind to go with his heart's desire. He is not quite as kind to the policy-oriented perceptions of Myres McDougal, who sees law as the inevitable end product of the pressure brought to bear on decision makers by a wide range of sociological factors. Stone argues that since the opinion of the individual is manipulated or suppressed by his government, there can be no empirical verification of the real claims, aspirations and expectations of different people. He warns against scientific pretensions and subjectivism. The blueprints for a human community advanced by Richard Falk (another notorious skeptic) do not escape the author's critical scrutiny. Although he evinces considerable sympathy for Falk's views, he can find no evidence that the prevailing order of coexistence between sovereign states based on mutual fear can be replaced. The fact that "World Order Models" can be envisioned does not make them plausible.

As an international legal philosopher, Stone reaches back to such classical savants as Grotius, Pufendorf, Wolff and Vattel to underscore that justice and equality among nations require difficult choices among competing values. Whereas, in the national sphere, certain procedural and substantive norms

have been accepted, in the more heterogeneous international arena there is still no assurance that the launching is more than "a series of forced landings and crashes" (p. 72). Self-determination stands in opposition to self-preservation of states. The doctrine that a state is sovereign over its own resources conflicts with demands for the transfer of resources from developed nations to undeveloped ones. The hallowed notion of equality requires distinctions between equality for states and equality for individuals. The notion that all states are equal ignores the reality of economic, political and military inequality. One must determine how much equality is enough for different groups in varied stages of economic and social development. In addition to technical problems of transferring benefits to the intended recipients, Stone points to the difficulty of knowing whether aid is more effective than enhanced trade in relieving economic injustice. He also fears that even if enlightened rulers were to recognize that social justice for all is in their own long-range self-interest, there are limits to how far they could go in imposing sacrifices upon their constituents. He notes that more wisdom and will are required before sovereign states can be expected to accept the high purposes of assuring minimum freedom and economic justice for all.

Stone's book is itself a paradox. On the one hand, he enumerates many reasons why visions of a peaceful world are unrealistic; on the other, he cannot fail to note some of the progress as he reassures the reader that the world is not coming to an end. He acknowledges, *en passant*, that nations have become more aware of the dangers and needs of the modern world. He decries the waste of resources generated by the arms race and the futility of the projected Strategic Defense Initiative ("Star Wars") to prevent nuclear holocaust. He welcomes the enhanced possibilities for dialogue between opposing camps and recognizes that peaceful decolonization has become a reality. He notes the constructive achievements of such agencies as the International Labour Organisation, the World Health Organization, the planned Sea-Bed Authority and the fact that a "New International Economic Order" is on the world's agenda. He acknowledges that, following the domestic pattern, there has emerged the sense of an international obligation to help eliminate the misery and destitution that continues to plague human society. There are many other advances he could have mentioned—in clarifying the norms of international behavior, in advancing the judicial settlement of disputes, in human rights protection and in gradually developing improved means for enforcing international law. Despite his pessimistic outlook, he concludes: "We should not despair. . . . The future task is to expand these bridgeheads. In part, it is the task of time, and the change that time brings" (p. 157). I would have been more reassured and happier if he had elaborated more on the progress and less on the problems. It would, perhaps, have been as accurate and certainly more inspiring and encouraging to his grandchildren.

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*Sovremennoe mezhdunarodnoe morskoe pravo* (Contemporary International Maritime Law). Chief editor: M. I. Lazarev. Moscow: Izdatel'stvo "Nauka," 1984. Pp. 270. 2 rubles, 50 kopecks.

Are states moving away from regulation through international law to administration through international law? Quoting a Soviet author with an affirmative view, the prominent Professor M. I. Lazarev and his team of maritime law specialists analyze developments in the law of the sea from its historical origins through negotiation and signature of the 1982 Convention. Although they seem unprepared to accept such a far-reaching conclusion, noting that there cannot be as yet repudiation of international law's imperative norms of sovereignty, equality of states and nonintervention in internal affairs, their text goes far to document the extensive institutionalization of maritime practice that has occurred recently.

The treatment of the exclusive economic zone in the Convention receives major praise. It is seen as an adroit compromise between the economic interests of coastal states and the global (regional) interests of those less favored geographically. From the authors' point of view, the EEZ preserves the navigational advantage of the traditional high seas concept while granting to coastal states the right to protect economic interests, including bioresources and the ecosystem as a whole.

The functions of the International Sea-Bed Authority are described in detail, and the authors include the negotiating positions of various delegations during the drafting process. There is praise for the dispute settlement procedure, but it is not unguarded. Although Soviet authors (Tunkin and Blishchenko) are cited to the effect that judicial decisions are evidence of practice, Lazarev, in a chapter to which he has put his own name as author, adds, "It is true that one cannot deny the role of decisions in forming norms and principles of maritime law." Then he cites the *Norwegian Fisheries* case and treats it as a good example, in that it influenced the drafting of the Geneva Convention of 1958, but he cautions:

However, the fact is inescapable that neither courts nor arbitral tribunals create norms of international law, as they are organs of its application, but states (law-creating organs) do with the aid of international treaties, and, in many cases, with the aid of international law custom. A court or arbitral decision cannot be taken as a norm of international law unless sanctioned directly or indirectly by a state [p. 186].

Evidently, courts are still not trusted in spite of additions to the bench of judges from socialist and developing states, for Lazarev maintains:

[C]ourts and arbitrators issue a class-oriented decision. The class nature of judicial decisions issued within a country is widely known. The class nature of international means of justice is less noticeable, but it is still more important because it touches the interests not of individual physical or legal persons but of entire peoples [*id.*].

A further word of caution is added: although peaceful methods of settling maritime disputes have met with some success, they should not be fetishized, for they remain instruments in the hands of classes and their politicians.



This monograph will infuriate some Western readers, for it is a running attack on the United States and some of its allies for refusing to sign the Convention and for rejecting Soviet initiatives in promoting the declaration of some oceans as "zones of peace." To the U.S. argument that there is a "Soviet threat," the authors reply that most of the world has rejected that argument, and that the U.S. presence in the Mediterranean and the Indian Ocean is a threat to Soviet frontiers in view of the long range of submarine-launched missiles.

Despite its militancy, the volume can be useful, for it provides with references information on Soviet doctrine and practice taken from widely scattered sources not easily found without such guidance.

JOHN N. HAZARD  
*Board of Editors*

*United Nations Law Making: Cultural and Ideological Relativism and International Law Making for an Era of Transition.* By Edward McWhinney. New York and London: Holmes & Meier Publishers; Paris: UNESCO, 1984. Pp. xi, 274. Index. \$34.50, cloth; \$19.50, paper.

In this relatively slim volume, Professor McWhinney has set forth some rather loosely organized thoughts on lawmaking (broadly defined) in the various organs of the United Nations. He is consistent in championing Third World views as to how new law is made—for example, by viewing General Assembly resolutions as "parliamentary legislation" (p. 62)—and on the content of the new law. For example, he views the new international economic order as embodying the new law.

McWhinney has little sympathy for the veto power of the permanent members of the Security Council, and thus virtually writes off that body's role as a lawmaker. He is not much more sympathetic toward the International Law Commission, which he says needs to be reformed to become a vital participant in the creation of new (i.e., non-Western) international law. He has somewhat greater hope for the International Court of Justice, mentioning several times its 1971 Advisory Opinion on *Namibia* as a welcome departure from its earlier performance in the *South West Africa* contentious cases. One assumes that he would have had even kinder things to say about the Court if he had been writing after the decision on jurisdiction in *Nicaragua v. United States*.

The reader does get a glimpse of some interesting ideas, but they are left largely undeveloped. At one point, McWhinney refers to General Assembly resolutions espoused by the Third World as increasingly acquiring "a sense of prophecy and of law-in-the-making" (p. 46). It would be interesting to see where that thought leads, but in this book it leads only to the vague assertion that such resolutions as those on decolonization, national ownership of natural resources and the like are part of the "as yet largely undefined *jus cogens*" (p. 58). At another point, the author asserts that the General

Assembly's 1970 Principles of International Law Concerning Friendly Relations and Co-operation among States may be seen as "advancing toward the status of imperative principles of international law, or *jus cogens*" (p. 142). This is heavy duty for *jus cogens*; some would question whether such an assertion, without considerable qualification and analysis, could be sustained.

McWhinney is better at broad generalizations than he is at specific legal analysis. For example, on several occasions when he is denouncing the use of the veto in the Security Council, he deplores the permanent members' failure to abstain from voting under Article 27(3) of the Charter. He does not mention, however, that the duty relates only to decisions under chapter VI and Article 52(3). Nor does he analyze what is meant by "dispute" in Article 27(3).

Finally, this reviewer cannot avoid mentioning that McWhinney's prose would earn him no plaudits in an expository writing class. Turgid sentences are not to be encouraged, even in legal writing.

FREDERIC L. KIRGIS, JR.  
*Board of Editors*

*Managing Trade Relations in the 1980s: Issues Involved in the GATT Ministerial Meeting of 1982.* Edited by Seymour J. Rubin and Thomas R. Graham. Published under the auspices of The American Society of International Law. Totowa, N.J.: Rowman & Allanheld, Publishers, 1984. Pp. 266. Index. \$48.50.

As its subtitle indicates, this book was destined to be outdated in some respects even before it was published. The essays included are final versions of papers prepared by present and former government officials for discussion by an American Society of International Law panel before the 1982 GATT Ministerial Meeting. Various authors address institutional features of the GATT, sectoral issues such as services and agriculture, relations with developing countries and a couple of subjects whose relation to the meeting was a little less direct (the Caribbean Basin Initiative and reciprocity bills). Most of the essays combine analysis of trade problems with proposed negotiating aims. Insofar as the ministerial meeting is 2 years gone and has left little legacy, the direct relevance of this book may be limited today. It remains of interest chiefly as an example of current approaches to improving international trade relations.

The key concept, as suggested by the book's title, is that of "managing" trade relations. As diverse as the essays are in scope and quality, they share a kind of self-imposed limitation. None offers a bold, or even mildly innovative, approach to trade problems and negotiations. Several of the essays, particularly those on services and agricultural trade, are largely devoted to explaining the intractability of these problems. Other essays, seemingly despairing of international agreement on the substance of problems, revive time-worn suggestions that the United States centralize its trade bureaucracy

(pp. 15–16), that GATT members pay more attention to the institutional features of the organization (pp. 46–48) and that the United States press for increased legitimacy for public resolution of disagreements through the much maligned dispute resolution mechanism in GATT (pp. 56–57).

Perhaps there is merit to one or more of these suggestions. At best, though, they bespeak a “managerial” attitude in a time when the structure of international trade relations threatens to disintegrate. The incremental steps suggested in much of this book may seem practical because they are not ambitious and might be accepted by U.S. trade partners. Yet they may turn out to be impractical in a more important sense if they fail to address the underlying problems of international economic relations.

Ironically, the editors’ introduction catalogs some of these more basic issues: the substantial international divergence of views about the legitimate role of government in the economy, the increasing difficulty in distinguishing between domestic and international economic policies. Yet the succeeding chapters take little notice of these issues. The chapter on services, for instance, seems to treat all national regulation of service industries simply as trade barriers, with little recognition that important substantive economic policies may lie behind these measures. The chapter on the MTN codes is even more discouraging, for it shows no recognition whatever that the Subsidies Code both warned of the adverse effects of domestic subsidies on other countries *and* acknowledged the important role these subsidies play in economic development. It is hard to understand how U.S. officials, or those of any other country, can successfully “manage” trade relations if they do not address the differences that threaten to make these relations unmanageable. Instructive in this regard is Mike Gadbow’s chapter on GATT, which avoids ill-advised recommendations for negotiating aims because it is grounded in a careful analysis of actual difficulties in GATT dispute resolution and decision making.

But even careful “management” falls short of confronting the more basic issues of vastly divergent government approaches to economic policy in an era of substantial world trade. These differences promise to be indefinite and to require mechanisms for international economic relations that do not rely upon a model of government nonintervention. Present and future policymakers concerned with establishing a less fragile trade order must also consider the possibility that the basic GATT approach to trade liberalization and world economic growth may simply be inappropriate today. Recent scholarship has developed the hypothesis (still debated) that a liberal trade order has only existed during periods of economic hegemony by either Britain or the United States.<sup>1</sup> Regardless of the ultimate validity of this “theory of hegemonic stability,” the literature discussing it suggests strongly that the route to stable international trade relations in the last years of the 20th century may look quite different from anything we have known before.

<sup>1</sup> For a recent, moderately critical review of the literature supporting this hypothesis, see Stein, *The Hegemon’s Dilemma: Great Britain, the United States, and the International Economic Order*, 38 INT’L ORG. 355 (1984).

A couple of the essays do offer information not generally available elsewhere and a point of view from which this information is developed: Gad-baw's previously mentioned essay on the GATT is joined in this regard by Leonard Weiss's insistent, but comprehensive, chapter in which he argues that congressional efforts to enact "reciprocity" bills are ill-advised. Still, this book is probably not the best survey of trade problems in the 1980s.<sup>2</sup> It is representative of the weaknesses and some of the strengths of approaches to trade relations now prevailing in certain Washington quarters. Reading it makes one wish that its capable authors would discard some conventional wisdom, read some history and put their minds to work creating some more daring proposals.

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*The Future of International Law in a Multicultural World.* (Workshop held at The Hague, 17-19 November 1983.) Edited by René-Jean Dupuy. The Hague, Boston, London: Martinus Nijhoff Publishers, 1984. Pp. xi, 491.

This book is a collection of the papers presented at a colloquium held in The Hague in 1983 on the future of international law. The subject is a formidable one. A summary of the presentations at the close of the book suggests that the future of mankind depends upon its law, and the future of law depends upon the conscience of mankind. This is to be achieved "by a daily effort, by thoughtful and critical pragmatism."<sup>1</sup> Presentations were made by authors from Western European countries, the United States, Africa and Asia. The lone spokesman from Eastern Europe was Judge Lachs (Poland; judge, ICJ), and the Soviet Union was represented by only brief comments from its ICJ judge, P. D. Morozov. The themes in the book vary from philosophy and sociology to methodology, and to various treatments of "culture," but excluding "economics" and "politics."

A few of the authors can be singled out to indicate how they perceive the future of international law. M. Khadduri gives a brief introduction to the interrelationship of Islamic law and international law, and the Universal Islamic Declaration of the Rights of Man is reviewed by Z. Haquani. Adda Bozeman puts her main stress on the issues that transcend cultural differences among nations, i.e., those relating to urgent demands for at least a minimum global order: the control of war and the quest for peace in a global context of competitive and hostile ideologies.

<sup>2</sup> That distinction may lie with a volume published by the Institute for International Economics. *TRADE POLICY IN THE 1980s* (W. Cline ed. 1983).

<sup>1</sup> Dupuy, opposing the Soviet notion of coexistence as the adversarial opposition of hostile rivals, also notes: "International law will be adapted to [multivocational] schemes if it is conceived to promote co-habitation, not coexistence."

Professor Bozeman's essay, however, suggests that the differences in perspective of the Soviet Union and the Western democratic nations may be the source of more serious rifts than cultural differences alone. She cites, for example, the observations of Communist Party General Secretary Yuri V. Andropov, who declared that "our [Soviet] response to events in Afghanistan was a lofty act of loyalty to the principles of proletarian internationalism, which was necessary to defend the interests of our Mother-land." Bozeman is rightly troubled by this new extension of the Brezhnev Doctrine of 1968 because it so clearly implies that the contention between the West and the Soviet Union has led to a global challenge in which outright warfare between the major states is not to occur, but in which hostilities at a lower intensity of violence have become accepted, i.e., a response to one state's perceptions of its "interests" and justified by its perceptions of "self-defense." Bozeman concludes that "the world law-related customs and values are too diverse to be homogenized into one body of authoritative international law."

Judge Lachs declares that there "is one international law; that it is universal; for the present time in history we live in one world." He believes that "common interests and cooperation" and "legal links on many levels" have become essential, and that the international community shared by most "is illustrated by the mutual recognition of agreements." Lachs does not stress the development of customary international law as such, but his observations necessarily imply the development of that law notwithstanding "the great differences in culture, religions, traditions and law between the peoples of the world."

Judge Morozov of the Soviet Union argues in his very brief commentary that the Soviet beginnings in October 1917 have had a profound impact on international law, ending exploitation of man by man "for the first time," and compelling the assimilation of all international law under "peaceful coexistence," i.e., under a principle that "simply means that no military clash is tolerable" between the "socialist" and "capitalist" systems. He ascribes "the deterioration of legal machinery" to Western inaction—for example, he points to the failure of the United States to ratify both the Genocide Convention and the SALT II Agreements.

Others in the collection reflect upon the change from the traditional international law of Europe and the shift after the war to numerous "systems" of international law. "Old" states arise out of yesterday's "new" states, and their competing claims create a continuously repeating dialectic (McWhinney). There is a belief in arbitration as the means that will lead to the future development of international law (René David). This sentence from the book's conclusion perhaps sums up the thrust of the essays: "For we are in search of a future and a mankind which are still to be discovered." But the conclusion only suggests that the essays themselves, failing too often to reflect the underlying policy content of law, were unable to address and analyze the means for coping with a competitive clash among ideologies represented in part by totalitarian states and in part by those states with Western traditions aimed at optimizing human dignity. The cultural trends in the East and West differ widely, as do those in the North and South, but

the fundamental challenge to mankind "to be discovered" has already been discovered in the unfolding of the Western traditions. Men without dignity are robots.

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*Unspoken Rules and Superpower Dominance.* By Paul Keal. New York: St. Martin's Press, 1984. Pp. 262. Index. \$25.

The primary thesis of this book is that both the United States and the Soviet Union behave as if they have recognized each other's spheres of influence in the Western Hemisphere and Eastern Europe, and have reached a tacit and reciprocal understanding as to the type of behavior each will tolerate from the other in regard to their respective spheres. The author performs a most competent job in developing this theme throughout the first two parts of the book. Yet he devotes only the final, substantive chapter in part 3 to arguing a highly controversial corollary to his main thesis; namely, that although a spheres-of-influence system violates the basic requirements of international law and may be considered unjust, it has contributed to the creation of "order" in contemporary international politics. In the opinion of this reviewer, the author has failed to prove the validity of this dubious and dangerous proposition.

Of course, the author admits that the "order" he is talking about concerns the relationship between the two superpowers and is premised upon the interest both they and the rest of the world share in avoiding nuclear warfare. The author concedes that to preserve this superpower "order," the rest of the world must be willing to endure a substantial degree of lawless intervention, injustice and violation of fundamental human rights, perpetrated directly or through surrogate nations by each superpower within its sphere of influence. But the author should more appropriately address this argument to the oppressed peoples of Guatemala, El Salvador, Nicaragua, Chile, Haiti, Cuba, Hungary, East Germany, Czechoslovakia, Poland and Afghanistan. From their perspective, the so-called order derived from a spheres-of-influence system ruthlessly practiced by the two superpowers is thoroughly insidious and absolutely pernicious. One cannot realistically expect these oppressed peoples passively to accept for long the existence of a spheres-of-influence system operating at their direct and great expense. They will continually revolt against it, and in such revolts they will inevitably receive some degree of encouragement, support and assistance from the other superpower. For this reason, then, the inherent instability of the relationships between the two superpowers and their respective protégés will constantly threaten to spill over into global conflict.

This observation leads to the second objection to the author's unsubstantiated corollary to his main thesis. The facts of post-World War II history simply do not support his conjecture that the superpowers' establishment of a spheres-of-influence system has contributed to the development of international "order" even in U.S.-Soviet relations. For example, it was the un-

justified perception of the United States that it projected a sphere of influence over the Western Hemisphere that brought the world to the brink of nuclear warfare with the Soviet Union over the Cuban missile crisis. More recently, the Soviet invasion of Afghanistan destroyed détente, terminated genuine nuclear arms control and reduction negotiations between the two superpowers, and helped to elect the most belligerent President the United States of America has fielded since Theodore Roosevelt. As a direct result of the Afghan invasion, the U.S. Government purported to create a sphere of influence in the Persian Gulf by promulgating the "Carter Doctrine," which could readily precipitate armed conflict between the two superpowers that, as publicly acknowledged, America would necessarily have to escalate into tactical nuclear warfare, at a minimum. As for the future, if some day the Soviet Union decides to invade Poland against the wishes of that country's military Government, the NATO alliance would experience an extremely difficult time avoiding any type of involvement in the monumental struggle that would undoubtedly ensue between the Soviet, East German and Polish armies.

The author seems to have forgotten the primary lesson that historians have drawn from the First World War. It was the very dynamics and rigidities of the European great powers' spheres-of-influence system that, to a great extent, were responsible for the outbreak of that conflagration over the Balkans. Certainly, this was the conclusion President Woodrow Wilson drew in his famous Fourteen Points Address of January 8, 1918, the last point of which laid the cornerstone for the League of Nations. In that speech, Wilson emphatically decreed the death of power politics and all its essential accoutrements for the postwar world: spheres of influence, the balance of power, secret diplomacy, trade barriers, armament races and the denial of self-determination for peoples. This outmoded and dangerous set of Machiavellian principles had eventuated in such cataclysmic consequences that it needed to be replaced completely by an essentially different system of international relations based upon antithetical operational dynamics: international organizations and law, collective security, open diplomacy, free trade, freedom of the seas, arms reduction and disarmament, and national self-determination.

Miles Kahler has astutely observed in his now classic *Foreign Affairs* article, *Rumors of War: The 1914 Analogy*,<sup>1</sup> that it is a repetition of the "systemic breakdown" scenario responsible for the eruption of the First World War, not the "madman" explanation for that of the Second, which today's thermonuclear decision makers must scrupulously guard against. Hence, the author's intimations that the two superpowers *should* concede spheres of influence to each other in express violation of international law and at the cost of sacrificing the freedom, dignity and integrity of their influenced states and constituent peoples must be rejected. As recently recognized by Hans Morgenthau and George Kennan, the two leading founders of the modern *realpolitik* school of American foreign policy decision making, in-

<sup>1</sup> 58 FOREIGN AFF. 374 (1979-80).

ternational law and organizations, not Machiavellianism and its correlative spheres-of-influence system, seem to be the only way to avoid a third world war that would end in suicidal extinction for the entire human race. If the author seeks to controvert their collective wisdom and considered judgment on this matter, he will have to produce a book-length exposition.

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*Essays on the Modern Law of War.* By L. C. Green. Dobbs Ferry: Transnational Publishers, Inc., 1985. Pp. xxii, 281. Index. \$37.50.

Green's essays on the law of war have been published in various journals during the past decade. They range across the critical themes in that law and provide an excellent chance for the reader to have a mature grasp of a variety of current issues and challenges. The work is that of commentator and critic, and while Green does not appraise in depth the emerging strategic implications of the law of war, his comments are valuable for those of us who must.

The chapters in this work extend to "superior orders" (the defense asserted by those who act upon illegal commands), the role of legal advisers in the armed forces, human rights and warfare, the medical profession and war, air warfare, lawful and unlawful weapons, the status of mercenaries (no privileges, no protections), extradition and the enforcement of international criminal law. The last two chapters are on Canadian law and Canada's role in the development of armed conflict. While it is the English and Canadian perspectives that are stressed, those perspectives largely accord with that of the United States.

The first chapter provides an excellent and comprehensive survey of the subject and the major themes. Perhaps the major policy distinction in the law of war has been to establish a rule of law that would compel belligerent states to distinguish between combatants and noncombatants, and to provide appropriate protections to both groups of people. This distinction, in short, ensures that those engaged in the violence of war will meet at least minimal humanitarian standards in their task of destruction and death, and meet as high standards as can reasonably be attained in protecting the noncombatant—including prisoners of war and those rendered hors de combat.

The modern law of war, as Green's essays indicate, extends into a rich variety of themes beyond this major distinction. But some may lead to a major restructuring in the law of war itself, particularly if this law becomes "politicized." As Green points out, the protections provided to those engaged in "wars of liberation"—i.e., those defined specifically in Protocol I of the 1977 Geneva Protocols as peoples engaged in "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" under the UN Charter—could lead to erosion of the law of war, of the right to self-determination and of the UN Charter if they are permitted to expand.



Unquestionably, the provisions lead to the potential development of legal status for such groups, and to the gradual legitimization of such wars, at the expense of the governments or social orders that had maintained control over them. Whether such "wars" will spill out of the current framework into the demands and armed attempts at self-determination within the "socialist commonwealth" of Communist states remains to be seen. Here the Brezhnev Doctrine would hamper such a development, because that doctrine legitimates force to oppose such attempts. In introducing the political element into the law of war, there is a severe risk that the law will become a strategy to advance the policies of governments rather than a humanitarian law to moderate the suffering caused by the licensed violence of war.

The modern law of war as appraised by Green has other themes: mercenaries have no privileges as prisoners of war; reprisals are severely limited under the Protocols; nuclear facilities for producing power are not to be targeted, nor are dikes and other dangerous objects; and, while the attempt was made at improving and solidifying the authority and role of the protecting power—far too weak under the Geneva Conventions of 1949—the Protocols have succeeded in having international humanitarian organizations, particularly the International Committee of the Red Cross (ICRC), extend their competence and move further towards assuming protecting-power functions in future wars.

Green devotes one of his chapters to lawful and unlawful weapons and activities. This has been a crucial problem for modern warfare. Here the indeterminate issues arise, concerning the nuclear and also the chemical and biological weapons and agents—and perhaps the radiological agents and weapons—that can cause mass destruction and lead to indiscriminate attacks. The Geneva Protocols of 1977, largely guided by a framework designed by the ICRC, purposely put these issues aside, and the United States noted only the following as to nuclear weapons after adoption of the Protocols:

We recognize that nuclear weapons are the subject of separate negotiations and agreements, and further that their use in warfare is governed by the present principles of international law. . . . We further believe that the problem of regulation of nuclear weapons remains an urgent challenge to all nations which must be dealt with in other forums and by other agreements.<sup>1</sup>

The United States attached the following statement to its signature of the Protocols (which it has not yet ratified): "This signature is subject to the following understandings: . . . It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons."<sup>2</sup>

The ICRC had indicated, in submitting its draft of the Protocols, that it "does not intend to broach these problems," but that it had condemned the

<sup>1</sup> M. BOTHE, K. PARTSCH & W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 189 (1982).

<sup>2</sup> *Id.* at 190.

weapons of mass destruction in its conferences and "has urged governments to reach agreements for banning their use."

Green points out that the provisions in the Protocols concerning the environment may have some effect in this regard. Article 55 of Protocol I requires "care" in the "protection" of the natural environment against "widespread, long-term and severe damage." Such a protection would be in jeopardy in a future nuclear war, or even in a major conventional war with the current destructive power of conventional weapons. In any event, the enforcement of Article 55 is unclear: would it be only another count in the allegations against the vanquished in a victor's court?

A reading of Green's essays on a variety of subjects, including those mentioned and others, is a worthwhile effort for lawyers unfamiliar with the law of war to acquire an informed background on that law. Unquestionably, such a work has the biases and prejudices of its author, but that does not detract from the high standards that he maintains in these essays. The book can be recommended both for lawyers experienced in the law of war and for those who need to acquire some background on the subject. It fills the particular need that arises from the failure of many courses on international law to deal with the question of war. But such a reading will be enhanced if the reader has at his disposal the major treaties and agreements on this subject, including the Geneva Protocols of 1977.

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*The Modern Commonwealth.* By William Dale. London: Butterworths, 1983. Pp. xxxi, 345. Index. \$87.50.

Sir William Dale, former legal adviser to the Commonwealth Office (now the Foreign and Commonwealth Office), has used his experience, scholarship and fine attention to detail to produce a legal description of the British Commonwealth as it exists. Seminal documents, such as the Statute of Westminster, 1931 (pp. 21-24), are set out verbatim at appropriate places in the text instead of being relegated to the usual appendixes. This gives the documents a clear place in the narrative flow; and finding them by reference to the good index seems hardly more difficult than the minor traditional difficulty of finding appendix documents by looking them up in a table of contents.

The organization seems clear and logical. A brief historical section is followed by a longer section on "The Commonwealth Internationally," which actually analyzes the symbols of the Commonwealth and its overall character as an international organization with external relations that overlap the independent foreign policies of its members. A still longer section follows, with a meticulous analysis of the relationships among the members of the Commonwealth, including the common features of the written constitutions of many of the member states. The final, and longest, section is a country-by-country outline of the legal order of each member, including the United Kingdom itself.

A few words of caution, although not necessarily of criticism, seem to be appropriate. Some material is of such overwhelming triviality that only the most zealous of British specialists could find it interesting; for example, the brief discussion (p. 28) of how South Africa's legal view of the abdication of King Edward VIII in 1936 nearly resulted in the "embarrassment" of the Commonwealth's having more than one monarch for the brief period between the Declaration of Abdication (December 10, accepted by South Africa as transferring the title to George VI immediately) and Parliament's Declaration of Abdication Act (December 11). More seriously, some rather offhand language seems deceptive; for example, a reference to the Bonn Declaration on International Terrorism, dated July 17, 1978, as being "not without legal results, one being estoppel" (p. 50). There is no reason given why reliance on the declaration would be "justifiable" and thus why the law of estoppel is pertinent at all, other than to deny that the declaration is itself binding, which implies an opposite conclusion to that implied in the passage quoted. The listing of "The common law rules" regarding reception of English common law in the colonies and the brief discussion of them (pp. 7-8) is superficial to the point of being more an indication of how English lawyers liked to think about things than of the process by which English legal control over personal relationships, including foreigners, actually got extended to the outposts of the Empire.

Of particular relevance, perhaps, to American lawyers with no special interest in the Commonwealth is the general description of the legal powers of a Governor-General, logically found in the section on "Constitutional Conventions" (i.e., binding customs) (pp. 135-39), and the specific limits placed on the Governor-General of Grenada (p. 231). It seems abundantly clear that whatever the authority of Sir Paul Scoon to invite American forces to help restore orderly government to Grenada in 1983 (apparently after this book was published), any firm assertions about it are almost certainly wrong. The question is wrapped in implications deliberately left unanalyzed by those familiar with the delicacy of English and Commonwealth constitutional law.

Finally, it should be mentioned that a number of familiar works do not appear in the bibliography. There is no reference to the magisterial works of A. Berriedale Keith or Sir Robert Jennings or Sir Ivor Jennings.<sup>1</sup> But perhaps it is just as well that analytical works are not reconsidered in what is designed to be a descriptive guide. A deeper analysis of particular issues is more the province of the individual monograph. Read with appropriate caution concerning its descriptive functions and the limitations of description addressed to a system as legally and politically complex as the Commonwealth, this is a very useful first volume in a projected series whose analytical monographs will appear later.

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<sup>1</sup> A. B. KEITH, *IMPERIAL UNITY AND THE DOMINIONS* (1916); Jennings, *The Commonwealth and International Law*, 30 *BRIT. Y.B. INT'L L.* 320 (1953); I. JENNINGS, *CONSTITUTIONAL LAWS OF THE BRITISH EMPIRE* (1938) and *CONSTITUTIONAL LAWS OF THE COMMONWEALTH* (1957).

*The Soviet Union in the Middle East: Policies and Perspectives.* Edited by Adeed Dawisha and Karen Dawisha. Published for the Royal Institute of International Affairs. New York: Holmes & Meier Publishers, 1982. Pp. 172. Index. \$17.50, cloth; \$9.50, paper.

Adeed and Karen Dawisha have edited a superb study of Soviet foreign policy in the Middle East. The study consists of papers initially presented in the early 1980s in a Chatham House Study Group, funded by the Ford Foundation. The work does not represent an international legal study but would be of interest to anyone wishing to understand the nature of Soviet policy and influence in the Middle East and the various dimensions of the Soviet-American rivalry in the region.

The papers or essays tend to be interdisciplinary in approach, are quite objective and provide useful historical background. They offer insights into the dynamic political, economic and strategic relationships that exist between the Soviet Union and the states in the region. At the same time that attacks emanating from totalitarian states and radical groups in the Middle East attempt to undermine world order and justify the arbitrary use of force to right past injustices, Soviet policy, as this study indicates, faces limitations and obstacles linked to local attitudes and values.

The editors first present an overview of the work, underscoring the main points of each essay. Next, Adeed Dawisha focuses on the role of the Soviet Union in the Arab world and on the various limitations to Soviet influence. Malcolm Yapp considers the factors influencing Soviet policies toward the northern tier states. Robert Patman concentrates on Soviet involvement in the Horn of Africa, noting the shifting Soviet interests and the complexity of territorial claims in the Ogaden. Edwina Moreton examines the Cuban and Eastern European involvement in the Middle East and the degree of Soviet control and manipulation of such involvement. Anthony Stacpoole considers the role of energy in Soviet policy, and includes an appendix that identifies Soviet activities in the energy sectors in Iran, Iraq, Turkey and South Yemen. Alan Smith analyzes Soviet trade with the Middle East. Next, Shahram Chubin focuses upon the political dimensions of the U.S.-Soviet rivalry, and raises questions about the vulnerability of the West to Soviet actions. Jonathan Alford, in turn, focuses on the military dimension of this rivalry. He concludes that the United States must increase its naval responsibility in the area. In the final essay, Karen Dawisha views Soviet policy from the perspective of Moscow and concentrates on the Soviet "correlation of forces" or application of power in the region. She emphasizes that Soviet successes are not without fundamental problems.

The essays are well written and provide a crucial part of the elusive Middle East puzzle. The work is highly recommended for students interested in Soviet foreign policy and in Middle Eastern affairs.

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*Foreign State Immunity.* By the Australian Law Reform Commission (Report No. 24). Canberra: Australian Government Publishing Service, 1984. Pp. xxiv, 168. Index.

The availability of useful hindsight is no guarantee that they will be utilized. Happily, however, the Australian Law Reform Commission (ALC) has taken good advantage of preceding statutory forays into the increasingly problematic field of sovereign immunity in the course of mapping out a comprehensive scheme for its own Government to consider. In a tight and thoughtful discussion cum justification for draft legislation contained in an appendix to the report, the analysis of the ALC draws most heavily (and critically) from the legislative models already provided by the three common law jurisdictions closest to its own. The sovereign immunity statutes of the United States, the United Kingdom and Canada, respectively,<sup>1</sup> in the order of their enactment, provide the focus for a comparative commentary, a picking of favorites on various issues and some new departures.

For the foreign common law reader, the chief value of the ALC's work lies in its critical appraisal of what has gone before. Whether or not this Australian point of view manages to convince, it still provides a good, concise summary of the field. In its discussion of underlying principles (ch. 3), the report points to a more general acceptance of the theory of restrictive immunity than is perhaps generally supposed, especially by Western international law practitioners. The ALC sees the chief legal task to be the removal of uncertainty—for state actors, private actors with whom state entities increasingly interact and the courts from whom redress is sought. Thus, the problem lies in clarifying restrictions on immunity that may be easily stated in a general definition—as, for example, in relation to “commercial activities”—but that become hazardously problematic in distinguishing between the allegedly “public” activities of foreign states and any number of situations with serious consequences for private parties, where open-ended legal doctrine fails to show where immunity should not apply.

The preferred solution for the ALC is also a statute and not the common law (ch. 4). Here, however, the ALC advances greater concern than other jurisdictions for comprehensiveness in the statutory definitions by which a court will determine whether a foreign state's claim of immunity, either from jurisdiction in the first instance or from execution of judgment later on in the proceedings, shall be upheld (ch. 5). With respect to immunity from jurisdiction (ch. 7), the recommended approach differs significantly from that of the U.S. and Canadian statutes, which depend on the single criterion of “commercial activity” to distinguish between acts *jure gestionis* and the sovereign acts of state (*jure imperii*) to which immunity should still apply.<sup>2</sup> Instead, the UK approach of multiple criteria,<sup>3</sup> which subdivide the

<sup>1</sup> Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602–1611 (1982); State Immunity Act 1978, ch. 33 (UK) [hereinafter cited as SIA (UK)]; State Immunity Act 1982, ch. 95 (Can.) [hereinafter cited as SIA (Can.)].

<sup>2</sup> 28 U.S.C. §1605(a)(2) (1982); SIA §5 (Can.).

<sup>3</sup> SIA §§3, 4, 7, 8, 9 and 11 (UK).

category of commercial activity, is preferred. Apparently, the perceived benefits of certainty and specificity count for more "down under" than do the virtues of long-term flexibility inherent in the broad classification that holds sway in the North American schemes.<sup>4</sup>

For the ALC, the term "commercial" as a touchstone for a restrictive approach to sovereign immunity is at once too broad and not broad enough. Much of the criticism is well taken: "The more work concepts such as 'private' or 'commercial' have to perform in distinguishing non-immune from immune cases, the more difficult and intractable these concepts become." At the same time, the "commercial" category may be "too narrow in its coverage, since there are many relatively routine acts which are neither distinctive to states (i.e. 'governmental') nor, in the absence of some special feature, commercial" (p. 27). In this context, the ALC finds the U.S. distinction between the "nature" of a transaction and its underlying "purpose"<sup>5</sup> virtually opaque and singularly unhelpful (p. 28).

We may ask, however, whether the extensive if not unbridled faith of the ALC in an exhaustive statutory solution to the myriad subtle and not so subtle contradictions of dealing with international public actors in potentially private roles is entirely well placed. The well-known legislative drafting pitfall of *expressio unius est exclusio alterius* is avoided by broad language remitted to an informed judiciary in contemplation of inevitably unforeseen circumstances. Some of that faith may stem from the paucity of domestic case law in the field and the resulting unfamiliarity of Australian courts, which the ALC acknowledges (ch. 4). Yet, the merits of certainty still appear a trifle overrated. The relative infrequency of litigation is no protection from novelty. Nevertheless, the U.S. statute has been sharply criticized precisely because of its less than "enlightening" generality,<sup>6</sup> so there is little doubt the Australians have a point. Whether the ALC pursues exhaustiveness too far remains to be seen.

This preoccupation with specificity carries over to the ALC's discussion of remedies against foreign states and the subject of immunity from execution (ch. 8). Apart from a desire for more detail where possible, the ALC's recommendations adhere to the more generous notions of sovereign immunity at the remedial stage—as opposed to initial jurisdiction—generally prevailing in other jurisdictions. The "commercial purpose" criterion for distinguishing whether government property is *used* for "sovereign" or for private purposes adopted in U.S. legislation<sup>7</sup> is again declined in favor of the UK model, which is not restricted to property used by a state in conjunction with the

<sup>4</sup> Continued flexibility in the statutory scheme in the face of new international trends, together with the perceived impracticality of an exhaustive definition, influenced both the U.S. and the Canadian preferences for generality rather than specificity. See for the United States and Canada, respectively, H.R. REP. NO. 1487, 94th Cong., 2d Sess. (1976); H.C. Standing Comm. on Justice and Legal Affairs, Minutes of Proceedings and Evidence, 59:22 (Feb. 2, 1982).

<sup>5</sup> 28 U.S.C. §1603(d) (1982).

<sup>6</sup> See, e.g., Brower, Bistline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AJIL 200, 204-05 (1979).

<sup>7</sup> 28 U.S.C. §1610(a)(2) (1982).

activity on which the claim against it was based. Yet the ALC has no answer to the circular quality of both the UK and Canadian provisions, which condition the permissible extent of attachment of a foreign state's assets to the extent of the commercial purposes being pursued at a particular point in time,<sup>8</sup> except to supplement the circular definition with "specific provisions and savings clauses directed at particular problems and particular areas where difficulties may arise" (p. 77). The report also emphasizes discrete immunities that should be accorded public vessels, military, cultural, diplomatic and consular property and central banks. And it does break significant new ground by recommending forays into injunctive relief and other remedies either not provided for (in the case, e.g., of the United States) or specifically excluded (in the case of the United Kingdom and Canada) in the enacted statutes of other countries.

In the interest of comprehensiveness, separate treatments of submission to jurisdiction, express and implied (ch. 5), admiralty actions in rem (ch. 9), procedural aspects such as service of process (ch. 10) and miscellaneous matters not covered elsewhere (ch. 11) complete the report. And comprehensive it is, especially for the remarkably concise space it occupies in what could very easily have become a longer winded, if perhaps no less useful, exercise. In terms of what has gone before, the ALC appears to favor the UK statute, but there is no evidence of slavish devotion to any preceding statutory model.

Notwithstanding one's views about the overall approach of the ALC, the report provides an exceptionally cogent overview of the field; alternative choices are clearly stated. Given the function of such reportage, it deserves to be considered an excellent example of its kind and merits an appreciative international readership.

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*European Court Practice.* By John A. Usher. London, Rome, New York: Oceana Publications, 1983. Pp. xli, 357. Index. \$50.

The system of judicial remedies in the legal order of the European Communities has already been extensively examined. On the other hand, questions of procedure before the Court of the Communities so far have received little attention in the literature. The book under review closes this gap and offers a practical and useful guide to the various procedural problems raised both by the different actions that private parties, the member states and Community institutions may lodge with the Court, and by references of national courts to the Court for a preliminary ruling. Examining in great detail the formal requirements of the different actions in the course of the various stages of procedure, the author refers extensively and systematically to the case law of the Court.

Particularly valuable are those parts of the book that discuss the general or specific forms of procedure (interim measures, intervention), the internal

<sup>8</sup> SIA §13(4) (UK); SIA §11 (Can.).

operation of the Court (preparation, deliberation and drafting of the Court's decision) and the costs of procedure before the Court.

Although the book is obviously primarily intended for use by lawyers specializing in Community law, the author still considered it necessary to outline in the introductory part (pp. 1-51) the various types of direct and indirect actions, so as to prepare the ground for the subsequent discussion of the procedural problems. For someone unfamiliar with Community law, this introduction may not necessarily give a clear and complete picture of the jurisprudential development of judicial remedies. It is primarily in reference to the introductory part that the present reviewer has some minor reservations about some of the author's views (for example, his interpretation of Article 89 of the ECSC Treaty (p. 4) and Article 95(4) of the same Treaty, providing for the so-called small Treaty amendment (p. 43)). One may also doubt whether an action of a member state under Article 88 of the ECSC Treaty contesting a commission's decision determining an infringement of the Treaty could be classified as an annulment action in the proper sense (p. 87). Nor may the interpretation and understanding of some cases be generally shared. An example is the author's reference to *Kampfmeyer* as a valid precedent for delimiting the jurisdiction between the Community Court and national courts regarding the respective liability of the Community and the member state concerned. This is a bold interpretation, considering the complex and very particular background of the case, and it has rightly been severely criticized. Another point deserves a brief comment. The author correctly maintains that because of the nature of the preliminary procedure under Article 177 of the EEC Treaty, no intervention is possible (p. 112). This statement could have been usefully qualified by a reference to those instances in such a procedure in which the Court admitted observations of a third party that—and this is of decisive importance—had already intervened in the proceeding pending before the referring national court.<sup>1</sup>

Aside from these minor differences of view, there is one fundamental observation to be made. Throughout the presentation, the author attaches, in the opinion of this reviewer, an undue and disproportionate importance to the Court's case law concerning the various remedies available to its officials in their litigation with the Community. Without wishing to minimize the importance of the Court's jurisdiction over such litigations, the reviewer believes that it nevertheless remains a secondary jurisdiction, and lengthy discussion of it may rather blur the presentation of the main issues involved. Thus, the discussion concerning actions for compensation of damages is introduced by an examination of the noncontractual liability of the Community towards its officials (p. 33). To cite another example: in a discussion of the case law on interim measures, the author contrasts a decision of the Court on an enterprise's request for the suspension of an antidumping duty imposed by a commission on imports from third states with a ruling concerning a request for the suspension of a vacancy notice of the commission

<sup>1</sup> See preliminary rulings No. 2/74 (*Reyners v. Belgian State*), 1974 ECR 631, 646 and No. 9/74 (*Casagrande v. Landeshauptstadt München*), *id.* at 773, 779.



for a specific post, made by a Community official (p. 272). May such decisions dealing with fundamentally different situations and involving different issues be meaningfully compared and valid conclusions drawn? Such an approach may degrade the far more important jurisdictions of the Court that primarily concern the vast field of operation of the European Economic Community, within whose framework the legal protection of officials raises special problems and plays a subordinate part only. The Community is first and above all an economic community—and not a community of officials.

These observations should, of course, in no way diminish the great merit of this authoritative study as an indispensable guide for anyone engaged in litigation before the Court. Its undeniable value would have been even further enhanced if the author had viewed the case law of the Court more critically and made reference to the writings in the field.

GERHARD BEBR

*States of Emergency: Their Impact on Human Rights.* A study prepared by the International Commission of Jurists. Geneva, 1983. Pp. iii, 477. Sw.F.40; \$19.50.

Situations of emergency and the role that the law can play in their regulation are of crucial importance, as much for the frequency with which such situations occur as for the dangers in the abuse of rights that they encompass. In theory, to the extent strictly required by the situation, derogation and restriction of rights are possible during a public emergency that threatens the life of a nation. But derogation of certain essential rights, e.g., the right to life, freedom from physical torture and inhumane and degrading treatment or punishment, is not admissible. Unfortunately, theory does not always correspond with practice. Governments tend to identify legitimate challenges to them as dangers to the life of the nation. The declaration of states of emergency often replaces the search for political solutions through consensus, and justifies the application of military means to impose minority views. Normally, states of emergency are accompanied by disappearances, summary executions, detentions without due process, torture and other cruel, degrading and inhumane practices.

The International Commission of Jurists (ICJ), acknowledging the global importance of the problem, both in terms of the people affected and the essential values involved, began an important project that resulted in this publication. Experts from 15 countries embracing different legal cultures were asked to outline the norms concerning emergency situations in their countries, the actions taken during such emergencies, the extent of compliance with preexisting legislation, the abuses that had occurred and the reasons why the emergency was either terminated or institutionalized after the circumstances that prompted its declaration had ended. In addition to these expert studies, two questionnaires were sent to 158 governments. One questionnaire concerned the norms and practices followed during emergency situations and the other related to the practice of administrative internment. Thirty-four countries replied to these questionnaires.

On the basis of the experts' country studies and governments' responses, the staff of the ICJ undertook an analysis of the legislation, practices and abuses of states of emergency as compared with the international legal requirements applicable during states of emergency. The ICJ also presented recommendations to be implemented at both the national and the international levels.

The book presents a rich collection of materials in the country studies. In addition to the thorough analysis of legal norms, the book supplies economic and political criteria that allow the reader to enhance his understanding about emergency situations. A typology dividing emergency situations into states of exception and regimes of exception is also presented. States of exception are conceptualized as "extraordinary modes of governing provided for by the laws of the country and subject to such laws for their declaration and implementation." Regimes of exception are defined as "de facto situations of a purely political nature, which cannot be justified in terms of the laws valid in a given state." Such regimes may have democratic or authoritarian goals.

A noteworthy aspect of the book is that its analysis of the effect of emergency situations is not restricted to one set of rights. Both in the country reports and in the general observations and conclusions, the ICJ presents the effects of states of emergency on economic, social and cultural rights, political rights and the right of self-determination, the right to development, the right to due process and the rights of detained or imprisoned persons.

This broad analysis presents the reader with sufficient information to reject commonly held assumptions such as "the restriction of rights is necessary for economic development" and "temporary restrictions allow peace to come back to the country." More often than not, what really happens is that general and cultural, economic and political impoverishment is produced by the lack of educational and cultural pluralism, by restrictions on the ability to distribute and receive information, and by the limits on the freedom of political organization, which otherwise allows social participation and the articulation, integration and defense of economic interests.

It is not easy to get out of emergency situations. As in the case of extraordinary taxes, states of emergency are transformed from temporary situations into permanent ones; but in the latter case, essential rights are affected. The accumulation of power destroys the mechanisms for its own control, tends to perpetuate political failures and makes it extraordinarily difficult to achieve normality. In this context, the salvation of a nation and the continuation of its existence as an organized community paradoxically become a salvation from the original saviors.

It is extremely important to attempt to isolate the causes that lead to emergency situations. In the book, the authors identify the significance of social unrest prompted by economic injustices, which leads to governments' decisions to "treat the symptoms without treating the disease"; the resistance to change of ancient absolutist moral values and political habits; the emergence of the doctrine of national security, a simplistic approach that leads

to the militarization of politics and the politicization of the military as "internal enemies" are destroyed without consideration for human rights.

The editors have taken care to make comprehensive recommendations inspired by the behavior of individual governments and by the international community's successes and failures. The recommendations include developing clear criteria for the declaration of states of emergency, enlarging the list of nonderogable rights, establishing workable tests of necessity, temporality and proportionality for the derogability of others, adopting provisions concerning the correction of abuses, and preventive and precautionary measures.

Without diminishing the quality and importance of this valuable book presented by the ICJ, some shortcomings can be noted. The country reports are of varying quality, and not every specialist has followed the same set of criteria as would ideally be desirable for comparative purposes. In addition, the experts might have been requested to provide an analysis of the impact of international law in their own countries.

The book's basic assumption that rationality prevails in the minds of those empowered under a state of emergency is both a strength and a weakness. This assumption permits the authors to make domestic and international recommendations involving both substantive and procedural norms. But brutality can drive out rational thinking and even usher in an element of the absurd. There is the doctor in a Latin American country whose torturer, in between periods of brutal abuse, kindly requested medical advice for the treatment of his obesity. There are those generals—ultimately defeated—who declared wars against stronger enemies and were fanatically joined by most of those whom they previously had tortured. There is the country where a gigantic, forced exodus from the cities was followed by an even more pathological genocide, finally consuming its perpetrators.

In emergency situations, as in wars, the absurd often prevails and tends to limit the extent to which such situations can be rationally managed. That is not to say that attempts to control and ultimately eliminate such situations should be discouraged. Quite the opposite, and the ICJ book brings us closer to that goal.

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*Human Rights: The Inter-American System.* Binders I, II and III. Edited by Thomas Buergenthal and Robert E. Norris. Dobbs Ferry: Oceana Publications, Inc., 1982–1983. Updated periodically. \$85/binder.

In this three-binder, loose-leaf set, Professors Buergenthal and Norris have substantially achieved their goal of providing a "systematic compilation . . . of the legal and constitutional instruments . . . [that] bear on the protection of human rights within the inter-American system." In so doing, they have produced a valuable resource for scholars and practitioners interested in the legislative history and evolving case law of the OAS human

rights system. Various minor errors and omissions that detracted from the original issuances have been corrected, and with more regular updates, one may anticipate that the third binder will achieve and maintain substantial currency.

Binder I includes chapters on the OAS Charter, the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Commission of Women and other inter-American conventions, declarations and resolutions that concern human rights issues. Each chapter includes a discursive introduction, the full text of the document or documents discussed, a select bibliography and a chart of ratifications where applicable. In addition, the chapters on the Court and Commission include their respective regulations, rules of procedure, memberships and selected background materials.

Binder II compiles a record of the drafting history of the American Convention, including the Conference of San José's summary minutes, working documents, final resolutions and list of participants. The editors have made a major contribution (at least for English readers) by providing careful translations of documents previously unavailable or not readily available in English. Their arrangement of participants' observations and comments on the draft Convention by article and source, and their indexing of the summary minutes by article and session, facilitates systematic research.

Binder III reproduces the principal case decisions, resolutions and reports of the Inter-American Commission on Human Rights and all of the opinions issued by the Inter-American Court. As of August 1985, the Commission's country reports, case decisions and resolutions were current through 1983; the Court's decisions and advisory opinions were current through mid-1984. In future updates, the editors expect to include decisions of domestic tribunals that interpret and apply inter-American human rights law.

Of the three, binder II is perhaps the most noteworthy, in that it has made available in English for the first time the full legislative history of the American Convention. Binder I also contains some first-time translations and hard-to-locate documents; however, the major contribution of binders I and III, as now constituted, is the collection and organization of documents that, though theoretically available from the OAS, are often difficult to obtain and most certainly are cumbersome to use. The anticipated inclusion in binder III of domestic case law will constitute a significant advance upon currently available references and undoubtedly will contribute to the further use and development of inter-American human rights jurisprudence.

This reader's only criticism is that the binder format, which adds considerably to the cost, appears well suited only to the third volume. Additions to the *travaux préparatoires* contained in binder II are unlikely to be necessary; amendments and additions to the human rights instruments set forth in binder I could be handled adequately by occasional pocket part inserts. That said, this reader is convinced that no international law or human rights library could be complete without the set; its distribution unquestionably

will facilitate the use and development of the human rights law of the inter-American system.

SANDRA COLIVER  
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*Digest of Strasbourg Case-Law relating to the European Convention on Human Rights.* 2 vols. Council of Europe. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG, 1984. Vol. 1 (Articles 1-5): pp. xvii, 669. Index. DM 237. Vol. 2 (Article 6): pp. xviii, 922. Index. DM 320.

The European Convention on Human Rights, which entered into force in 1953, is by far the oldest of the post-1945 multilateral mechanisms devoted to the protection of human rights. Today, all 21 members of the Council of Europe<sup>1</sup> are parties to the Convention, and all but four<sup>2</sup> have accepted the optional right of individual petition provided for in Article 25. Over 25,000 communications had been sent to the European Commission on Human Rights through the end of 1983; of these, nearly 11,000 were formally registered as complaints.

Over 80 percent of those applications registered were declared inadmissible without being communicated to the government concerned, a step that any practitioner should consider to be the minimum desirable outcome of a complaint. While the great majority of even the remaining 18 percent also were ultimately determined to be inadmissible, these approximately two thousand decisions (which include 180 reports on the merits adopted by the Commission and sent to the Committee of Ministers of the Council of Europe) constitute the heart of the jurisprudence developed by the European Commission and Court of Human Rights over the past 30 years. Seventy-two cases involving 110 applications have been referred to the European Court of Human Rights for final judgment.

These statistics are cited in the event that any lawyer still doubts the "reality" of international human rights law or pretends that human rights is merely a term for the exercise of selective political morality. At least within the context of Western Europe, human rights law has had an immediate, and in some countries, a directly enforceable, impact, and the European Commission and Court of Human Rights have delivered opinions with far-reaching consequences in areas as diverse and politically sensitive as illegitimacy, homosexuality, press censorship, loyalty oaths, the legality of "closed shop" trade union agreements, the rights of military personnel, compensation for nationalized businesses, fair trial procedures and the legitimacy of government actions in alleged states of emergency.<sup>3</sup>

<sup>1</sup> Austria, Belgium, Cyprus, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

<sup>2</sup> The exceptions are Cyprus, Greece, Malta and Turkey.

<sup>3</sup> Many of these cases are summarized and discussed in H. HANNUM, *MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW* (1985) and P. SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* (1983).

Partial digests and indexes to European human rights materials have been published in the past, and until the early 1970s it was still possible to discover relevant jurisprudence of the Commission and Court through cross-references and individual volume indexes.<sup>4</sup> However, the sheer quantity of decisions in the past decade created a vast body of jurisprudence that was simply inaccessible to all but the most tenacious practitioner or scholar. The *Digest of Strasbourg Case-Law*, of which the first two of a planned five volumes are reviewed here, is a long overdue attempt to classify and index this jurisprudence. Despite the few minor criticisms set forth below, it is a largely successful effort.

The reference in the title to "Strasbourg Case-Law" accurately reflects the substantive material covered by the *Digest*. While the cut-off dates are inexplicably different for each category, the *Digest* includes references (in most instances, up to some time in 1982) to judgments of the European Court of Human Rights; reports, opinions and admissibility decisions of the European Commission of Human Rights; and resolutions of the Committee of Ministers of the Council of Europe under Articles 32 and 54 of the Convention. The *Digest* consists of excerpts from all these sources, both published and unpublished, arranged according to the text of each of the articles of the Convention and its Protocols. Thus, volume 1 is concerned with Articles 1-5; volume 2 with Article 6; and the subsequent volumes with the remaining substantive articles.

Within the sections devoted to each article, the multitude of subdivisions set forth in the table of contents renders it relatively easy to identify the precise word, phrase or concept to which the excerpts relate; for example, excerpts relating to the prohibition of Article 3 against "inhuman or degrading treatment or punishment" are grouped under 16 categories such as extradition, conditions of detention, discrimination, solitary confinement, treatment by the police and relevance of the applicant's own behavior. Each subdivision is further identified by a rather confusing "numerical index system," which can easily be ignored without impairing the utility of the *Digest's* format.

While the substance of European human rights jurisprudence naturally is to be found primarily in the excerpts themselves, even the subdivision titles may be instructive. For example, over 50 pages in volume 1 are devoted to citations of cases that have identified various rights that are *not* protected under the Convention, including rights to an academic degree, to political asylum, to compensation for an injury that does not in itself constitute a violation of the Convention, to have criminal proceedings instituted against another person, to obtain a divorce, to enter public service or to free legal aid or medical treatment.<sup>5</sup>

<sup>4</sup> The most comprehensive and helpful survey of the work of the Commission and Court is COUNCIL OF EUROPE, STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS. THE FIRST THIRTY YEARS: 1954 UNTIL 1984 (1984).

<sup>5</sup> The Convention protects civil and political rights almost exclusively, although subsequent protocols have expanded its coverage somewhat. The most important European document

Article 6 of the Convention guarantees, *inter alia*, the right to a fair hearing in the determination of "civil rights and obligations or of any criminal charge," and the fact that an entire volume of the *Digest* is devoted to this single article accurately reflects the concerns of the Commission and Court with the multitude of issues that have arisen in this context. Certainly, the consideration by the European system of the meaning of such terms as "fair and public hearing," "within a reasonable time" and "charged with a criminal offence" is every bit as detailed (and occasionally convoluted) as anything studied in U.S. criminal procedure or constitutional law courses.

As a reference work, the *Digest's* utility rests largely on the ease with which it can be utilized, and the flaws noted by this reviewer concern primarily some admittedly minor irritations that may surface in using these volumes. The *Digest* contains no analysis or commentary, and the extensive excerpts are occasionally rather repetitive. More bothersome is the identification of cases by application number only and not by name, although a separately published *Register* is intended to include both; this omission makes it much more difficult to identify or rely upon those cases that have acquired a certain authority over the years. However, while precedent is not as important in the European system as it purports to be in the United States, the citations do seem to be arranged in rough order of precedence, from Court judgments through Commission admissibility decisions, thus enabling the user to distinguish to some degree among more or less important cases. Finally, while the brief subject matter index in each volume is adequate, there is no index of cases.

Judgments and decisions of the Court and Commission are published in the Council of Europe's *Yearbook on the European Convention on Human Rights*, and many of the Commission's opinions and decisions are available in the paperbound reporter series entitled *Decisions and Reports* (replacing the earlier *Collection of Decisions*). The selective nature of these publications is underscored by the remarkably high number of unpublished cases included in the *Digest*; while this testifies to the completeness of the latter, the practitioner or professor may feel a bit uneasy about relying on the contextual accuracy of a quotation without being able to check its full source. This situation does not impair the utility of the *Digest*, but it does highlight the need for a truly comprehensive reporting system for all decisions taken under the European Convention on Human Rights.

Of course, few American law libraries contain even the *Yearbook*, and collections of the *Decisions and Reports* of the Commission are rarer still. There is no excuse for this overly parochial view of relevant reference works, as a result of which an obscure publication by a U.S. law professor is more likely to be found in most law libraries than are such fundamental sources of international jurisprudence as those indexed in the *Digest*.

The *Digest* is not perfect and may initially seem awkward to those used

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concerned with economic, social and cultural rights is the European Social Charter, signed Oct. 18, 1961, 529 UNTS 89 (entered into force Feb. 26, 1965); *see generally*, D. HARRIS, THE EUROPEAN SOCIAL CHARTER (1984).

to key numbers and black-letter headnotes. It is, however, an essential reference work in any international law library worth the name, and its acquisition may even encourage greater availability of the basic sources from which it has been compiled.

HURST HANNUM

*Procedural Aspects of International Law Institute*

*Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Léontin-Jean Constantinesco.* Edited by Gerhard Lüke, Georg Ress and Michael R. Will. Cologne: Carl Heymanns Verlag KG, 1983. Pp. xv, 984. DM 298.

Friends and colleagues of Léontin-Jean Constantinesco had intended the book under review to be a *Festschrift* that was to be presented to the honoree on the occasion of his 70th birthday in February 1983. However, it became a memorial volume as a result of his death in November 1981.

How does one review a book containing 55 essays on a variety of topics in such fields as European Community law, private international law and comparative law? Moreover, these essays are written in different languages—German (32), French (14), English (4), Spanish (4) and Italian (1).

For a short review, it seems best to seek a theme that brings a degree of unity to a fair number of the essays and thereby to avoid sidetracking into such matters as the narrower aspects of human rights problems, self-determination with reference to ethnic minorities, criminal law, Argentine and Venezuelan law, belligerent occupation and cohabitation without marriage in Turkey.

Insofar as there is a degree of unity linking a number of these essays, it is to be found in the related concepts of European federation, however minimal its realization to date, and the relationships between the law of the European Community and the laws of the member states. These two interrelated themes also reflect one of the major interests of Professor Constantinesco.

Several of the essays refer to judgments of the Court of Justice of the European Communities that express the concept of the primacy of Community law in circumstances of conflict with national law, even when the latter is of later date. However, as Ami Barav points out in *L'incidence du droit communautaire sur le pouvoir répressif national*, the matter is not so simple. Ultimately, it is the national judge who is required to apply Community law in the case before him. Therefore, it is he who must interpret the Community Court's answers to the questions of law that are referred to it under Article 177 of the EEC Treaty. Obviously, complications can arise and, among other things, provide food for scholarly discourse much more voluminous than the samplings provided in the volume being reviewed.

As Vlad Constantinesco observes in *La primauté du droit communautaire, mythe ou réalité?*, the European Community treaties are not, formally, a federal constitution but are, instead, instruments of international law. Moreover,



they contain no norm explicitly according primacy to Community law when in conflict with the law of a member state. The issue of whether Community law conflicts with national law has to be raised by a party to proceedings before a national court. After reference to the Community Court, the national court then has to make a ruling valid within the national legal system, which gives the court an opportunity to "rebel," as did the tribunal in Lille in July 1981. Hence, there are grounds for questioning the degree to which Community law really has primacy over national law and for asking what authority the Community's agents, including its judges, possess over national officials. Such questions go to the heart of the issue of the proper functions of judges at the Community and national levels.

Furthermore, if one follows the reasoning of Athos G. Tsoutsos's essay on the relevance of Georges Scelle's concept of *dédoublement fonctionnel* to the formulation and administration of policy within various structures of intergovernmental relations, including the international, the political question arises as to whether the true scale of measurement of the effectiveness of an intergovernmental agglomeration, federated or not, is one that compares regional officials' capacity to rise above nationalistic or, at the subnational level, parochial views. Even this last statement is relatively simplistic, given the complexity of human relationships. For the units that together constitute an organization are themselves beset by disagreements of more than local consequence.

The essay by Jean-Paul Jacqué, *Réciprocité, droit communautaire et droit interne français*, which deals with France's 1958 constitutional requirement of reciprocity both as a condition for rendering treaties and accords superior to laws and also for accepting limitations on French sovereignty, presents an example of how, within a member state, agencies can be in disagreement about the status of Community law. The Constitutional Council, the Council of State and the Court of Cassation differ over whether lack of reciprocity can be invoked in regard to the obligations of EEC member states, who shall determine whether the condition of reciprocity has been met and what the effect of lack of reciprocity on the status of a treaty might be. In respect to the broader effects on the European Community, Jacqué indicates that acceptance of the requirement of reciprocity has the structural effect of bilateralizing intra-Community relationships, thereby rejecting the idea of Community solidarity.

The preceding paragraphs provide but a glimpse of what is to be found in this collection of essays. As was conceded above, the various topics dealt with are too numerous even to list in full. At the cost of injustice to the other authors, particularly the authors of the many stimulating German contributions, what has been said here about a handful of essays on the Community law-national law relationship serves to suggest that this *Gedächtnisschrift* provides useful information, some methodological suggestions and much food for legal and political thought.

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*International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization.* By Peter Macalister-Smith. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xiv, 244. Index. Dfl.130; \$45. Copublished with the Henry Dunant Institute, Geneva.

Dr. Macalister-Smith's interesting and important study is the first comprehensive work devoted principally to peacetime humanitarian actions from the point of view of international law and organization. The only previous full-length monograph in the same area, which the author cites with approval, is M.-A. Borgeaud's thesis on the ill-fated International Relief Union, published during the League of Nations period. Many recent works, of course, deal with problems of refugees and armed conflict, but few concentrate on questions of assistance; likewise, the growing body of literature relating to so-called natural disasters has so far lacked a significant contribution concerned with international legal and institutional aspects. This carefully documented book therefore fills a long-standing gap, and it should be well received not only by specialists in international humanitarian law and organization but also by public international lawyers interested in the evolution of the world order, and by all concerned with human rights and development problems, whether from the standpoint of politics, law or administration. The inclusion of the texts of pertinent documents enhances the usefulness of this volume as a basic handbook.

Humanitarian problems have existed throughout history, but today there is an acute need to solve many new problems of international assistance arising in a wide variety of emergency situations, as demonstrated by current events in Africa and elsewhere. As the author points out, "Disasters affecting human beings will probably occur with greater frequency and severity in the future" (p. 5). Hence the urgency of efforts needed not only to identify the inadequacies of existing international law and organization relating to humanitarian assistance, but also to develop new legal and institutional foundations on which more effective humanitarian and preventive actions can be based.

Following a brief historical introduction and a comparative survey of the relevant traditional areas of humanitarian law—armed conflict and refugees—the book goes on to examine in detail the relief role of the International Red Cross and the United Nations and its agencies, including in particular the Office of the United Nations Disaster Relief Co-ordinator (UNDRO). Developments in regional and nongovernmental organizations are also considered, as well as the question of bilateral humanitarian assistance. The relevance of existing principles and instruments, including human rights law, is assessed, while necessary measures and appropriate forms for further progress are discussed.

In his foreword, Prince Sadruddin Aga Khan, Cochairman of the Independent Commission on International Humanitarian Issues, emphasizes the importance of seeking new and better approaches: "The principle of humanity must prevail upon and condition military necessity, state security and political considerations" (p. x). While it is far from certain what solutions

will ultimately emerge in the way of law and practice, Macalister-Smith's work clearly makes an important contribution to the analysis of this view. The study also gains current interest by setting in context UNDRO's proposed draft convention on expediting emergency assistance,<sup>1</sup> which has so far attracted relatively little attention.

The overall emphasis of the book is on relief actions seen as a part of the process of development, recognizing that prevention is of the greatest importance, but not denying the urgency in the short and medium term of improving the means of providing the necessary assistance. No adequate definition of humanitarian emergency or disaster can be found in international law, but the author argues for the framing of a wide concept of humanitarian action to take full account not only of the plight of those whose situation may be characterized as a permanent state of emergency, but also of the diversity of the humanitarian tasks carried out by the many different actors in the field. To support this unifying approach, the author suggests that the cooperative international action required to tackle the humanitarian problems of extreme poverty, famine, refugees and victims of other disasters can engender wider beneficial international effects. Pointing to the inadequate foundations for humanitarian actions contained in Article I(3) of the UN Charter, the author concludes that increasing international responsibility for humanitarian assistance deserves to be "recognized and expressed in a general legal formula capable of supporting the international humanitarian order for the foreseeable future" (p. 169).

Macalister-Smith's book is timely, informative and thorough, as all those currently involved in the humanitarian field will certainly attest upon reading it. Practitioners today should find it of special value in setting the complexities of humanitarian law and organization into perspective, and future scholars working in this area will be well advised to start their research here.

ALFRED-MAURICE DE ZAYAS  
*Geneva*

*Međunarodno pravo i međunarodna sigurnost: Pravni domašaj helsinškog završnog akta.* By Vladimir-Đuro Degan. Sarajevo: "Svjetlost," OOUR Izdavačka djelatnost, 1982. Pp. 161. Index.

Professor Degan's book deals with the legal significance of the Helsinki Final Act of 1975. For those who can read Serbo-Croat it will certainly be a good introduction to the reassessment of this important document that is sure to take place on its 10th anniversary. The presentation sets a middle course between those who attribute enormous legal significance to the document and those who dismiss it as a mere political proclamation. The author does not claim that the Final Act is an international treaty, but he believes that this fact did not prevent the statesmen who signed it from committing the countries they represented if they clearly wanted to do so and expressed

<sup>1</sup> UN Doc. A/39/267/Add.2 (June 18, 1984).

their intentions accordingly. This conclusion is based on a detailed analysis of final acts of diplomatic conferences, unilateral declarations, statements of "summit meetings," political agreements and so on.

Nevertheless, Degan believes that the law-creating scope of the Final Act is not significant. Legal obligations entailing international responsibility are, according to him, to be found only in the Declaration of Principles; the remaining parts are only an ambitious plan of possible cooperation among the states represented at Helsinki. Their provisions are formulated in such a manner that they would not have binding effect even if they were included in a formally impeccable treaty. Degan further maintains that the binding provisions of the Final Act are only an adaptation of the existing rules of general international law to European circumstances. The only exception, he believes, is the duty of participating states to refrain from demanding territory from any other participating state. He finds that this rule is not contrary to existing obligatory norms of international law, but imposes on states that have accepted it additional restrictions. The author is of the opinion that the conflicting needs for stability and peaceful change are balanced by the recognition that frontiers can be changed, in accordance with international law, by peaceful means and by agreement.

Apart from the main line of reasoning sketched in this note, this book contains other interesting and valuable passages, some of them descriptive, and some offering new insights into matters that are not immediately related to the principal subject. Even though the reader may not agree with all the author's conclusions, he must respect Degan's learning and close legal reasoning.

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*International Copyright and Neighbouring Rights.* By Stephen M. Stewart. London: Butterworths, 1983. Pp. xii, 740. Index. \$170.

Stephen Stewart has edited and contributed to a well-written and thorough treatise on copyright law. In some three hundred pages he gives us the ideological underpinnings of copyright, both in the Anglo-Saxon system and in the continental "droit d'auteur" system, as well as the historical backgrounds of these two major systems of rights. A firm grasp of the principal differences and similarities is essential to an understanding of the international protection of copyright.

The "droit d'auteur" (author's right) system "is a child of the French Revolution" but has been adopted to varying degrees by most of the non-Anglo-Saxon world. Its philosophical base is that the right to the work results from the act of individual creation. The work is a manifestation of the personality of the author and remains linked to him throughout his life. The inalienable "droit moral" (moral right) is a significant aspect of this system. Perhaps the most far-reaching contemporary consequence of the individualistic aspect of the author's right concept is that, being an individual right,

it can only originate in an individual and not in a company or corporation, the source of the bulk of contemporary works.

The Anglo-Saxon or "copyright" system bases itself simply on the right of the author to prevent the unauthorized copying of physical material. Copyright focuses on the material support rather than the creation. Modern concepts of copyright stem directly from the Statute of Queen Anne of 1709 in the United Kingdom. The main objective was the protection of booksellers (publishers), and with such an economic underpinning this system has had less trouble in extending itself to 20th-century needs.

Historically, both systems were created when the system of privileges that had operated on both sides of the Channel from the invention of the printing press to the 18th century was abandoned. Stewart gives us background to the principles of the international copyright conventions. He defines the subject matter of copyrights and the various rights attaching to it. The basic differences in approach between the "droit d'auteur" system and the copyright system are reflected in the international conventions dealing with copyright. Stewart devotes a chapter to each major convention in which he explores its background and provisions.

The second part of the book is a country-by-country survey of the laws in 13 major countries or regions of the world (Austria, France, the Federal Republic of Germany, Italy, Scandinavia, the United Kingdom, the USSR, the EEC, the United States, Latin America, India, Japan and Australia). These synopses of law are written by eminent authorities from each country or region and many of the authors participated in the negotiation and drafting of the international conventions discussed in the first part of the book. Very useful appendixes with the English texts of the major international conventions are provided, together with selected bibliographies for each chapter. This is a book designed for use by academicians and practitioners alike.

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*Brussels*

*The Orbit of Space Law.* By Damodar Wadegaonkar. London: Stevens & Sons; Bombay: N. M. Tripathi Pvt. Ltd., 1984. Pp. xii, 172. Index.

The law of outer space has recently been promoted from the realm of a few apparent science fiction lawyers to an honorable and respected field of international law. Since President Reagan's "Star Wars" speech of 1983, the need for international cooperation in and regulation of space activities has become clear. Wadegaonkar's volume is an introductory text to this field.

The book is divided into seven chapters; appendixes contain the major treaties (and two draft treaties) that constitute the major components of the law of outer space.

Chapter 1, "The Fundamental Principles of Space Law," is an analysis of the foundations of space law. The author explains how the formulation of

space law has come about in three stages: the acceptance of the 1967 Outer Space Treaty, the ratification in the following years of treaties dealing with "the details" of "the general framework provided by the first phase" and the various bilateral and multilateral agreements that have been subsequently entered into (p. 3). In addition to the above, space law is based on principles established by the Legal Sub-Committee of the United Nations Committee on Peaceful Uses of Outer Space (COPUOS), the practice of states (and the tacit acceptance of their acts) and the writings of jurists (pp. 3-4).

One of the unique facets of space law is that while only a few states are involved in space-based activities, the law "has been shaped by the international community as a whole." This, in turn, is a victory for those, like Wadegaonkar, who believe in the need for and supremacy of consensus over majority rule (p. 6).

In chapter 1, Wadegaonkar also analyzes "the four basic treaties" of space law: the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty); the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Agreement on the Rescue and Return of Astronauts); the 1974 Convention on Registration of Objects Launched into Outer Space (Convention on Registration of Space Objects); and the 1972 Convention on International Liability for Damage Caused by Space Objects (Liability Convention). (All appear in the appendixes, together with the 1979 Moon Convention, the 1981 Draft Principles Governing the Use by States of Artificial Earth Satellites for (International) Direct Television Broadcasting and the Draft Principles as contained in the Report of the Legal Sub-Committee on the Work of its Twentieth Session (pp. 125-66).)

The impetus for the Outer Space Treaty was the so-called moon race. When President Johnson stated that the "exploration of . . . celestial bodies will be for peaceful purposes only," and the USSR called for an international agreement to that effect, the way was open for agreement to be reached (p. 12).

The author's interpretation of the military aspect of the Treaty is worthy of close examination. He writes:

Article IV of the treaty can be regarded as the most important arms control development in Outer Space and restricts military activities in two ways. Firstly, it contains an undertaking not to place *any* weapon in any orbit around the Earth, instal on the Moon or any other celestial body or otherwise station in Outer Space nuclear or other weapons of mass destruction and secondly, it prohibits the establishment of military bases or installations, placing of weapons or conducting military manoeuvres in these spheres. It is noteworthy that the prohibition contained in the first part applies to both Outer Space and celestial bodies, whilst the prohibition in the second part applies to celestial bodies only . . . [p. 13, emphasis added].

While basically correct, Wadegaonkar has made a revealing error—revealing, that is, for those of us who believe in the importance of dotting "i"s and crossing "t"s when formulating a treaty.

All of the multilateral treaties dealing with space (that are considered by the author) have been put forth by the UN General Assembly in the form of annexes to resolutions calling for their ratification. Wadegaonkar bases himself on these annexes, and we therefore read in the appendix that, according to the first paragraph of Article IV, "States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or *station weapons* in outer space in any other manner" (p. 126, emphasis added). In point of fact, the Treaty as ratified is slightly, but very significantly, different. "[S]tation weapons" has been amended to read "station such weapons."<sup>1</sup> In other words, the prohibition is only against nuclear weapons and weapons of mass destruction and not against "any" weapon, as Wadegaonkar paraphrases. He thus, inadvertently, reveals one of the major faults of the Treaty. Its other major fault, the lack of a mechanism for its interpretation and the resolution of conflicts, is clearly stated (p. 15).

The lack of such a mechanism is also a drawback of the Agreement on the Rescue and Return of Astronauts, which was only reached after the United States and the USSR took a direct interest in it, unfortunately as a result of the *Apollo I* and *Soyuz I* tragedies, which resulted in four deaths (p. 16). The Agreement obliges states not only to assist astronauts in distress, but also to return space objects that, according to the author, are part of "experimental and scientific flights beneficial to humanity," i.e., that are not of a military nature (p. 18).

The 1974 Convention on Registration of Space Objects "assists in the identification of space objects which makes the provisions of the 1972 Convention on Liability more effective and also avoids the presence of unidentified objects in Outer Space" (p. 19). The latter Convention represents a clear advancement in international law, "in as much as it relaxes the rule of nationality of claims and the rule of exhaustion of local remedies." It also provides a novel way for the participation of international organizations in the Convention framework (p. 27).

Chapter 2 is a survey of "The Moon Treaty of 1979," which Wadegaonkar asserts came about as the result of fears of the "non-national" appropriation of the moon and the possibility of its "peaceful" militarization, as well as the stationing and use of conventional weaponry on its surface (pp. 30-31). The major stumbling block to agreement was the issue of the exploitation of the moon's natural resources, which, as finally agreed, is possible only if "carried out for the benefit and interests of all countries" (p. 33).

One advancement of the Treaty (over the Rescue and Return of Astronauts Agreement) is Article X, which the author interprets as "requiring States to adopt all practicable measures to safeguard the life and health of persons on the moon and regard[s] every such person as an astronaut" (p. 35). Another advancement is Article XI, which "seeks to establish an

<sup>1</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, done Jan. 27, 1967, 18 UST 2410, TIAS No. 6347, 610 UNTS 205.

International Regime to govern the exploitation of the natural resources of the moon" and "deals with the thorny question of ownership of the moon" (p. 35). This regime is to assure "equitable sharing" by all states in lunar treasures, with the space powers being more equal than others (pp. 35-37).

In chapter 3, Wadegaonkar tackles the issues of "Delimitation of Outer Space and the Question of Geo-Stationary Orbit." After surveying "The Myriad Theories of Delimitation" (pp. 39-43), which range from the belief that delimitation is not necessary to the conviction that it is critically important, the author, rather convincingly, argues that "it would be advantageous to have a proper definition [i.e., agreement on the boundary of outer space] so that misunderstandings or uncertainty may not lead to international stress-conflict situations" (p. 41). This is especially true in the case of the problem of the use of the geostationary orbit:

since the Geo-stationary spots are physically limited, a proliferation of the Geo-stationary satellites, will bring their number to a saturation point because only a limited number of such satellites can work at one time in the Geo-stationary orbit so as not to affect each other adversely. It is these facts which should make States realise that, a use of the Geo-stationary orbit by any one country to put satellites into slots does not give an eternal right of occupation, since that would [be] tantamount to national appropriation. The rational use of the Geo-stationary orbit can be ensured only through international cooperation and specific agreement between States [pp. 57-58].

While it is debatable whether "eternal occupation" is equivalent to illegal "national appropriation," especially as Article II of the Outer Space Treaty states that "Outer Space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means" (p. 126), Wadegaonkar's call for an international agreement should be heeded.

Proceeding to deal with the concrete issue of the "Legal Implications of Remote Sensing" (ch. 4), Wadegaonkar surveys the deliberations of COPUOS, which "has been searching for a legal regime that would accommodate common interests of all States for the optimum utilisation of this potentially beneficial technology and provid[e] adequate protection for their legitimate military and economic interests" (p. 61). Regrettably, its search has been far from fruitful, as there have been continuous disagreements, key issues have not been dealt with and only rarely have principles been accepted that are not already established in the Outer Space Treaty (p. 73).

In chapter 5, the author summarizes the debate over "Direct Television Broadcasting by Satellites" between the Western nations supporting the maximum dissemination of information and freedom of expression, and the socialist and developing states who fear interference in their internal affairs (pp. 83-84). It is important to note that while basing himself on UN General Assembly resolutions, Wadegaonkar gives (perhaps unintentionally) the impression that he is writing in the realm of *lex lata*. Furthermore, he makes the surprising claim that "nothing would prevent governments from halting unwarranted messages [i.e., television broadcasts] by using *jamming* techniques" (p. 95, emphasis added).



Chapter 6, "Military Escalation and the Use of Nuclear-Powered Sources (NPS) in Outer Space," is a summation of UN activities in these fields. The debates over NPS held in COPUOS have centered on five major issues: "(1) information concerning the use of NPS, (2) notification prior to re-entry, (3) assistance to States in emergency situations, (4) protectionist measures against radiation and (5) liability of [*sic*] damage arising out of the use of NPS in Outer Space" (p. 98). That the latter three topics should need to be discussed, is clear evidence of the shortcomings of the existing space treaties.

As for the issue of militarization (specifically, the legality of antisatellite weapons), Wadegaonkar rightly supports the call for an agreement that would "identify types of activities which are permissible on the understanding that anything else is prohibited," i.e., a reversal of the present situation whereby "what is not prohibited is allowed" (p. 110). In this way, all space weapons could be outlawed.

In the last chapter, "Recent Developments in Space Law and Some Conclusions," Wadegaonkar draws the reader's attention to such future problems as the legal status of space crews, responsibility for internationally owned and operated spacecraft, and the potential needs of space settlements (pp. 113-15). After summarizing the preceding chapters (pp. 116-18), he briefly surveys "the institutional framework which supports Space Law," to wit: Intelsat, Intersputnik and Intercosmos (pp. 118-23).

Finally, Wadegaonkar (who is the Principal of the Government Law College of Bombay) concludes with the optimistic observation that the development of space law has shown that cooperation is possible when the will exists, and that the United Nations has played a positive role in this ever-expanding field (p. 123).

Despite the far too many grammatical and typographical errors, Professor Wadegaonkar has provided the interested reader with an excellent starting point for an understanding and appreciation of the complexities of this fast-expanding branch of international law.

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*International Conflicts of Labour Law: A survey of the law applicable to the international employment relation.* By Felice Morgenstern. Geneva: International Labour Office, 1984. Pp. ix, 129. Sw.F.25.

The subject of conflicts of law is becoming increasingly important in labor law. In the past few years, two international congresses have made it their central theme: the 11th International Congress of Comparative Law, held in Caracas in 1982, and the first European Regional Congress of the International Society for Labor Law and Social Security Law, held in Szeged in 1984. Felice Morgenstern explores this new terrain with gusto. The book is, in fact, the first English-language monograph on international conflicts of labor law. (*International Labour Law* (1968), by István Szászy was a translation from the Hungarian.) Instead of being a study of American or British conflicts of labor law, Morgenstern's book constitutes a global and compar-

ative survey of the diverse problems and possible solutions in the field of transnational labor relations. The legal systems both of developing countries and of Western and Eastern bloc states are considered. This work therefore expands the list of general treatises on international conflicts of labor law written by Gamillscheg (*Internationales Arbeitsrecht*, 1959), Szász, Russomano (*Direito internacional privado do trabalho*, 2d ed. 1979) and Dumortier (*Arbeitsverhoudingen in het Internationaal Privaatrecht*, 1981), the last of which escapes consideration by Morgenstern.

The goal of the book is to contribute to bridging the gap between the theoretical reflections of individual specialists and practical legal application in a field where sufficiently clear rules do not exist. The four chapters are divided by topic into three parts: the positive law sources (ch. 1, pp. 5-13), the law applicable to the employment relation (chs. 2 and 3, pp. 15-93) and the legal order applicable to labor-management relations (ch. 4, pp. 95-119). The author emphasizes in the introduction that within the scope of a comparative law study it is only possible "to indicate key problems and trends in their solution and to seek to provide some guidance on the possible practical implications of those trends" (p. 1). She relies on legislation, court decisions, treaties, commentators and expert groups in the discussion of the "Sources of the relevant law." The concept of "source" is thus used in a purely pragmatic sense. It comes as no surprise that legislation plays no great role as a relevant source of law (p. 5). The accent is clearly on court decisions and individual commentators.

The second and third chapters consider the legal framework of the international individual employment relation and form clearly the most significant and far-reaching part of the book. The determination of the law applicable to the individual employment relation is the central point in the second chapter (p. 15 ff.). Several more important problems arising from the establishment, conditions and termination of labor relations are discussed in chapter 3 (p. 61 ff.). In many countries, the parties themselves can determine the law of the employment contract, although the questions that immediately follow are how far the possibility of choice of law extends, whether it will be displaced by other rules (p. 33 ff.) and whether or not the application of foreign law will be rejected (cf. p. 43 ff.). The choice-of-forum clauses pose similar questions (p. 47 ff.).

The mandatory rules of the individual employment relation, the forum state and the place of work all need to be considered, together with those of the law governing the contract. A number of states do this implicitly or expressly in legislation. Great Britain, for example, has many statutes that explicitly declare the law of the employment relation to be irrelevant to the scope of their application. The author remarks here, with reason, that the collective nature of labor-management relations leads to this result, independently of the law applicable to the individual labor contract (p. 36). She refers to the widespread tendency for the public law (*öffentliches Recht*) of the foreign place of work to be applied even when the labor contract is subject to another country's law. The proposal to resolve uncritically, according to the most favorable law, the differences, for example, between the rules of

the forum and the place of work is viewed skeptically by the author, who considers it an oversimplification (p. 42).

Whether the application of foreign law is treated as a violation of public policy depends to no small degree on the domestic effects of the foreign law. The permissibility of choice-of-forum clauses depends more on the aspect of derogation (prohibition of forum) and less on that of prorogation (selection of forum) (p. 50).

Of the problems discussed in the third chapter on the establishment, conditions and termination of employment relations, the identity of the employer in multinational enterprises, equality of treatment, the minimum wage and the hours of work deserve attention. Naturally, marked difficulties are presented by the different ways of ending the relationship, above all through dismissal by the employer (p. 81 *ff.*), since the individual legal systems vary immensely in this area. Determination of the applicable law practically by necessity depends on the choice made under the contract or contacts with the forum. Some countries consider the law of the contract applicable, others the law of the affected labor market (*cf.* p. 82).

In the fourth and closing chapter, the author scans developments in the area of collective labor relations, using scholarly literature almost exclusively. She examines in particular employers' and workers' organizations (p. 95), collective agreements (p. 100 *ff.*), workers' representation in the enterprise (*id.*) and collective disputes (p. 112 *ff.*). On the question of recognition, the author reports primarily on American cases (p. 97). Of special interest is the discussion of the applicability of national collective agreements outside the country of their conclusion (p. 102 *ff.*). The central norm for workers' representation at the plant level is that every establishment is governed by the relevant laws of the jurisdiction in which it is located (p. 107). The issue of participation in management of the enterprise is quite different. The permissibility of collective disputes in general is judged under the law of the place where such action is taken, e.g., the law of the place of work (pp. 112, 115).

No book, of course, is immune from criticism. For the development and understanding of international conflicts of labor law, the substantive labor law plays an important role. Confining herself to a relatively limited scope, the author presents little in this regard. Likewise, she says virtually nothing about substantive norms with territorial restrictions inherent in their subject matter, a constellation of particular importance in labor law. In many cases, inferences from such norms can be drawn with application to conflicts of law. It is also frequently the case that defining the line between substantive norms and conflicts-of-law norms presents difficulties. A further weakness of the book is its undifferentiated handling of conflicts norms divorced from their concrete context. Rules of socialist states rest generally on a completely different foundation from those of Western industrial states. In this reviewer's opinion, the numerous constitutional law aspects of labor law deserve to be considered in a separate section.

The foregoing comments should not detract from the overall positive impression made by this book. The author did not set out to unleash new

theoretical impulses or introduce as yet undiscussed questions into scholarly debate. She desired in the first place to build a bridge between theory and practice. In this she has succeeded. Within this framework, it is also proper, on the reviewer's part, to exercise only occasional criticism of the opinions expressed.

It is noteworthy that the author uses and discusses judicial decisions and scholarly literature in no fewer than six languages (English, French, German, Italian, Portuguese and Spanish). This is very rare. One feels that the work can therefore be considered thoroughly representative. It is no reflection on the author that in most cases definitive pronouncements are not yet possible. Seen in its entirety, the book offers a fruitful contribution that will take an important place in the further discussion of the international conflicts of labor law.

ROLF BIRK  
Trier

*Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law.* By J. G. Lammers. Boston, The Hague, Dordrecht, Lancaster: Martinus Nijhoff Publishers, 1984. Pp. xxvi, 724. Indexes. Dfl.275; £69.95; \$110.

In 1984 two excellent works on the pollution of international rivers were published. Students of international law can now choose between the very complete treatise of J. G. Lammers and José Sette-Camara's lectures at the Hague Academy of International Law.<sup>1</sup>

The book by Lammers is very thorough and the mere enumeration of its chapters would take up most of this review. However, the principal parts should be mentioned in order to give the reader an overall idea of its contents: the book begins with an introduction, followed by chapters II, which covers definitions of water pollution and transboundary pollution; III, "Certain Parallel International Legal Developments" (domestic proceedings; the domestic approach compared with the intergovernmental approach); IV, "Treaty Law"; V, "General International Law" (its nature; the search for customary international law and principles of international law applicable to the pollution of international watercourses; general principles of national law which can be applied); VI, "International Case Law," with reference to the principal cases relating to pollution of rivers as well as other decisions of tribunals (such as the *Trail Smelter* case, the *Corfu Channel* case and the *Island of Palmas* case); VII, "Academic Views" (in which various theories are classified and analyzed); VIII, "Final Observations on the Substantive Rights and Duties of Riparian States inter se under General International Law in Respect of Prevention or Abatement of Pollution of International Watercourses"; and IX, "Aspects of State Responsibility and Strict Liability Concerning Pollution of International Watercourses" (responsibility for

<sup>1</sup> Sette-Camara, *Pollution of International Rivers*, 186 RECUEIL DES COURS 117 (1984 III).

wrongful acts and liability for the harmful consequences of lawful acts involving pollution).

At this stage, it should be pointed out that the problems raised in the book are of interest not only to jurists but also to students of international relations. The legal aspects began to come to the attention of international lawyers after 1972; the issues raised before and after that date have usually been resolved on political or economic bases, i.e., legal implications have played a secondary role. In the prolonged negotiations regarding the pollution of the Rhine, economic and commercial arguments always prevailed. The arguments put forward by states also depend on their geographical position vis-à-vis the river: while the downstream riparian states favor stricter rules in the matter, the upstream states normally invoke the principle of territorial sovereignty. For example, Lammers mentions that the position of the Austrian Government regarding Austria's rights in respect of the waters of various watercourses has shifted according to whether Austria was the upstream or downstream state (p. 209).

One feature of the book that will be welcomed is the meticulous study of state practice. The presentation of the jurisprudence is excellent, as is the reference to declarations of states. With regard to the latter aspect, this reviewer feels that the time factor plays an important role, since decisions prior to the Stockholm Conference of 1972 have above all a historic value, especially those based on absolute territorial sovereignty.

The author centers his attention on European state practice, especially on the Rhine, the most polluted watercourse in the world. Reference should also be made to the examples of the United States, Mexico and Canada. There is a logical discrepancy between the treatment given to the pollution of European watercourses and the situation in the developing countries. The fact is that the issue has hardly arisen in most cases, and in the case of South America, the vast, almost uninhabited, areas explain this phenomenon. It should also be recalled that during the 1972 conference, it was pointed out that 90 percent of the world's pollution could be laid at the doors of the industrialized nations, and that, consequently, they have had to find solutions, legal, technical and otherwise.

Many of the issues raised by the author deserve emphasis, but two deserve particular attention, namely, the formation of customary international law with special reference to the environment (pp. 149-64) and the question of nuclear weapons tests from the environmental point of view (pp. 319-26).

Lammers takes the view that

there exists a rule of customary international law when States adopt, with regard to a given situation falling within the domain of international relations, a particular course of conduct in the conviction that such conduct is required by international law even in the absence of a treaty provision or other binding provisions of written law prescribing such conduct [pp. 149-50].

The author does not believe that "the mere frequency of similar provisions in a great number of treaties furnishes conclusive evidence of the existence of a rule of customary international law" (p. 155). On the other hand, "res-

olutions adopted at international conferences or international public organizations may—at least insofar as they are an expression of the views of States—also provide valuable evidence of the *opinio juris* of States” (p. 153). These two opinions are controversial. In the case of the international law of the environment, for example, the fact that certain rules figure in most treaties has undoubted value. In the case of resolutions, their evidentiary value is linked not only to *opinio juris* but also to preexisting international law.

I fully endorse Lammers’s conclusion “that the continued exercise of nuclear (weapon) tests in the atmosphere can already be regarded unlawful *for environmental reasons*” (p. 326). This opinion may also be contested, but it must be noted that the author limits the unlawfulness to environmental issues, while the reviewer feels that nuclear explosions should be outlawed in every case.

The bibliography is excellent and up-to-date. But what strikes one’s attention is the linkage of the footnotes to the bibliography, in which a very ingenious method is adopted that deserves to be used in future publications in the field of international law.

In conclusion, this is an excellent contribution that will certainly be one of the principal sources on the pollution of international watercourses as well as on all other types of pollution, and the author deserves to be congratulated on his work.

G. E. DO NASCIMENTO E SILVA

*Comunità Europea e protezione dell’ambiente.* By Paolo Bianchi and Giovanni Cordini. Padua: CEDAM, 1983. Pp. xvii, 472.

Bianchi and Cordini’s book sets out to describe the role played by the European Economic Community in the protection of the European environment. The book satisfies the increasing demand among scholars and the public for a cultural debate and for political measures concerning “the improvement of life” in Italy, where EEC multiform activity on environmental protection has for some time not been sufficiently studied. The work is the result of years of joint research under the auspices of the Centre of European Studies of the University of Pavia.

Bianchi and Cordini have the merit, first, of taking a systematic approach to all the Community’s legislation on the environment. They cover exhaustively every possible aspect of environmental protection. It is a considerable undertaking, for the subject covers an extraordinarily large number of issues. The authors approach the subject from a legal point of view and their work might be considered as fundamental for those who study EEC environmental law. In spite of the continuous activities of the Commission, the Council and the European Parliament, the book remains, 2 years after its publication, a remarkably basic work, since it is the only one to have taken a specifically legal approach to the subject. Now, new directives are in force,<sup>1</sup> and the

<sup>1</sup> See Directives 82/884/EEC, 82/176/EEC, 83/513/EEC, 82/883/EEC and Regulations (EEC) 3626/82 and 3418/83.

Council and the Commission have issued many recommendations, decisions and opinions, but in only a few cases, such as judgment No. 140 of June 8, 1984 of the Italian Constitutional Court in the matter of direct application of EEC regulations, have events superseded the book's contents (p. 44).

The book deserves praise for its detailed discussion and examination of the justification for the EEC's legal action on the environment and for emphasizing its extent. However, probably because of the complexity and breadth of the subject, some parts are structurally weak (e.g., ch. 2) and repetitious (e.g., pp. 90-115). Moreover, it is unfortunate that the authors do not mention the practical results of the implementation of EEC environmental policy. It would have been useful to know the existing state of the national laws of member states in relation to EEC directives and recommendations for all of the issues examined (pp. 301-05 *et seq.*). The Commission has started many infraction procedures and some states such as Belgium and Italy have even been sued before the Court of Justice of the European Communities.

The book consists of three parts. Giovanni Cordini wrote about legal fundamentals of the Community's environmental policy, and in chapters 3 and 4 of the second part, about the state of integration regarding water, the atmosphere and waste. Paolo Bianchi wrote the last two chapters of the second part, on the protection and rational administration of the natural environment and energy resources. The authors jointly edited the bibliography. It is a sound collection of titles and, even though most of the works cited were published in the mid-1970s, it is a unique source of reference and information on legal works on the environment. The accompanying list of all the documents dealing with the environment promulgated by the EEC, together with the European Court of Justice's judgments, is remarkable and has only been superseded by a very recent EEC publication on environmental policy.

The authors maintain that under Article 2 of the Rome Treaty, Community organs are entitled to deal with environmental issues because environmental protection and pollution might interfere with living standards in Europe and with commerce among member states. The EEC Treaty does not expressly mention environmental protection; Articles 30-39 of the EURATOM Treaty and Articles 54-55 of the EEC Treaty concern only the protection of working conditions and protection from radiation. However, geographic and economic links make Europe one unit, and the Council and the Commission initiatives are legally grounded in Articles 100 and 225 of the Treaty (establishment and functioning of the Common Market and member state measures that might distort the conditions of competition in the Common Market).

The European Court of Justice has ruled on the legality of directives issued on the basis of Article 100 of the Treaty (Cases 91/79 and 92/79 of March 18, 1980) and on the jurisdiction of local courts in the matter of damages (Case 21/79 of November 30, 1976). EEC action is ruled by the principles of policy embodied in the programs of action issued in 1973, 1977

and 1982. At present, their implementation takes place through common action, the sharing of information, harmonization of urgent measures on environmental protection, identification of industry costs and their influence on the environment, scientific research, general directives issued by the Council, continuous updating of rules and laws in connection with scientific and technical progress and in relation to Third World countries, and joint research programs and their integration.

General directives deal with the quality of water, atmospheric pollution, ordinary, toxic and noxious waste, admissible noise levels and motor vehicle exhaust systems, sound emissions from construction yard engines and the dumping of dangerous substances in the sea. In spite of the wide scope of the programs of action, the number of directives (specific and general) and regulations is limited because of the economic interests involved in environmental protection.

In the second and third parts of the book, the authors analyze the situation for each issue in relation to Community activity that falls outside of directives, regulations, decisions, recommendations and opinions. Part II is also accompanied by a large number of tables with technical details.

In conclusion, even though other works on this subject have been published in the past 2 years and EEC action on environmental protection is getting more effective and concrete, Bianchi and Cordini's book can be highly recommended as an expert study on environmental law. Its theoretical legal approach should appeal to scholars, lawyers and experts in environmental protection.

IDA PAVESI

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*The Evolution of the Law of the Sea: A Study of Resources and Strategy with Special Regard to the Polar Regions.* By Bo Johnson Theutenberg. Dublin: Tycooly International Publishing Limited, 1984. Pp. viii, 261. \$25, cloth; \$12.50, paper.

The author contends that recent developments in the law of the sea result primarily from modern trends in international law that emphasize resource allocation, while downplaying factors (e.g., military and strategic considerations) that historically have been more important in the evolution of the law of the sea. This volume discusses the potential consequences of this departure from traditional analysis on the legal status of the polar regions.

The first three chapters contain general background material. Chapter 1 discusses the technological advancements and accelerating exploitation of resources that prompted extensions of national jurisdiction and provided, at least in part, the impetus for UNCLOS III. Chapter 2 contains a general summary of the 1982 Convention on the Law of the Sea, while chapter 3 reviews the Convention's treatment of four areas of the law of the sea of significance to an analysis of the polar regions: the right of innocent passage



through the territorial sea, the right of transit passage, the exclusive economic zone and the extension of coastal jurisdiction over the continental shelf.

Chapter 4 examines the impact of the Convention on the Arctic—a region of great resource potential and almost unique strategic significance because of its proximity to the superpowers. The Convention would place vast areas of the Arctic, formerly treated as high seas, under various regimes of national jurisdiction. This possibility requires each Arctic state to decide whether and to what extent it should extend its jurisdiction over the Arctic in light of the right of other Arctic states to do the same. This decision is made more difficult by the effect of the Arctic's extreme climate and geography on navigation, particularly submarine navigation, and by uncertainties regarding the regime of transit passage. In addition to the potential effect on the balance of power, the Convention would also restrict the availability of the Arctic for other purposes, notably scientific research.

Chapter 5 discusses the Antarctic, which, though not subject to occupation in the classical sense, has been subject to various, often competing, territorial claims. These claims are held in abeyance under the Antarctic Treaty of 1959, which allows the parties, among other things, to participate in cooperative scientific research efforts. The direct impact of the Convention on the Antarctic region is minor, primarily involving the extension of the resource zones adjacent to the Antarctic coast. The indirect effect of the Convention will be significant, however, because it embodies the concept that the resources of certain areas constitute the common heritage of mankind and as such require collective regulation and preservation by and for the benefit of the international community. Much as in the case of seabed mining, many states feel that the Antarctic should not be subject to exploitation and control by only those states that are able to maintain a presence in the Antarctic or are parties to the Antarctic Treaty.

The reader is continually reminded that the Arctic and Antarctic, though seemingly similar, are two very different regions affected in very different ways by the Convention. The Arctic is an ocean to which the Convention applies—thus imposing on an area long subject to ad hoc solutions a generalized legal regime that was developed without full consideration of its effect on such areas. The Antarctic is a continent subject to a specific legal regime now being questioned because of the resource orientation of modern international law and, in particular, the law of the sea. The full impact of the Convention will not be known for years, but it is clear that the Convention will dramatically change the legal status of the Arctic and Antarctic.

The volume includes the complete text of the Convention, the Treaty of Spitzbergen, the Antarctic Treaty of 1959 and related materials. The author's multidisciplinary approach is successful, as the information on history, geology, resource potential, climate and military considerations is more than sufficient to provide the reader with an introduction to international legal issues involving the polar regions and the impact of the Convention on those issues.

DONALD E. KARL

*Yearbook Commercial Arbitration. Volume IX—1984.* Pieter Sanders, General Editor. Published under the auspices of the International Council for Commercial Arbitration. Dordrecht: Kluwer Law and Taxation Publishers, 1984. Pp. xxviii, 539. Dfl.95; \$38.

In the past decade or so, publications dealing with international arbitration have increased dramatically, creating a compendium of knowledge that is appreciated by the practitioner. A prime example is the *Yearbook Commercial Arbitration* published by the International Council for Commercial Arbitration (ICCA). Now in its ninth volume, this annual update on international arbitration law and practice is perhaps the one collection that is indispensable to practicing attorneys. Its general editor is Professor Pieter Sanders, the indefatigable author and scholar in residence in the Netherlands on the subject of international arbitral matters.

The full series of the *Yearbook* (vols. I–IX) constitutes a mini-encyclopedia on arbitration of particular benefit to American readers, as all materials are presented in English. Thus, foreign statutes, laws, arbitral awards, court decisions and national country reports on subjects of arbitral significance can be quickly scrutinized before conferring with foreign counsel.

The format of volume IX follows in general the pattern of the eight previous volumes. This work, however, is the most comprehensive to date. It contains 538 pages of material, is more than twice the size of volume I and is composed of seven main parts.

Part 1 contains two new national country reports. Dr. Albert Jan van den Berg, the newly announced general editor of the *Yearbook*, has prepared a readable and readily understandable version of the Saudi Arabian arbitration practice. His contribution is an auspicious beginning to the difficult chore of following in Sanders's footsteps. The other new national country report is on Ireland and is written by Max W. Abramson, a solicitor and experienced international arbitrator. Although Irish arbitration law contains only "trivial changes" from the English Arbitration Act of 1950, it is nonetheless helpful to learn of these differences. This part also contains an update of five previous national reports that appeared in 1977 or 1978. The updates cover Australia, Austria, South Africa, Switzerland and the United States.

Part 2 consists of two sections, the first of which contains heretofore unpublished arbitral awards or extracts from various parts of the world. These awards are truly helpful to practitioners because they allow parties to review how arbitrators have decided previous cases. Traditionally, arbitral awards were considered private and not publishable. ICCA's publication of such awards is a welcome contribution to the literature. Two of the more interesting awards published include *Kuwait v. AMINOIL* and *Southern Pacific Properties v. Arab Republic of Egypt*, both involving claims against governments. The second section features court decisions from Austria, Brazil and Pakistan that deal with general issues of arbitration law. These cases are treated separately from the court decisions in part 5 of the *Yearbook*, which deals exclusively with national court interpretations of the 1958 New York Convention.

Part 3 is also divided into two sections. The first contains a summary of

the 19 model clauses for conciliation or arbitration published by the International Centre for Settlement of Investment Disputes (ICSID) and contains a helpful summary of those arbitral institutions that have announced their readiness to act as appointing authorities under the UNCITRAL Arbitration Rules. The second half of part 3 continues the coverage of the Iran-U.S. Claims Tribunal that began in the 1982 *Yearbook*. Similarly, the publication of some of the awards of the Tribunal's chambers as well as some of the Full Tribunal will be of interest to those readers who do not follow the specialized services that render full and immediate reporting of all Tribunal awards. As a practical matter, the *Yearbook* cannot provide the most current information since it is only a yearly publication. For instance, most of the organizational changes reported are already obsolete because of the resignations of a majority of the nine arbitrators within the past 6 months.

Of practical significance is part 4 of the *Yearbook*, which contains recent amendments to or enactments of arbitration statutes of 14 different countries, including the text of the 1983 Arbitration Regulation of Saudi Arabia and the 1983 amendment to the U.S. Patent Law, which permits arbitration of patent validity or infringement questions.

One of the unique contributions of the *Yearbook* is its attempt to collate court decisions from around the world that offer interpretations of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Volume IX continues this compilation with the summary of 29 recent cases from France, India, Italy, Switzerland, the United Kingdom and the United States, and offers in addition an extremely useful updated commentary by Dr. van den Berg that summarizes the jurisprudence to date. His 70-page analysis is worth the \$38 price of the book alone. With this volume, the *Yearbook's* total of reported court decisions is now 219 cases from 21 different countries—undoubtedly one of the most ambitious efforts to cover a multilateral treaty's use in practice.

The last two parts are a consolidated table of articles found in the first nine volumes and a bibliography of recent arbitration publications. Finally, a generalized list of arbitral institutions in some 43 countries is appended.

This volume should not be read as a single book. I recommend buying and maintaining the full series of the *Yearbooks* for research and insight into the legal aspects of international arbitration and its current evolution on the world scene. Volume IX is a worthy and helpful addition to ICCA's ongoing reporting service. May the changing of the guard from Sanders to van den Berg continue the tradition into the 10th volume and beyond.

GERALD AKSEN

*Basic Documents in International Law* (3d ed.). Edited by Ian Brownlie. New York: The Clarendon Press; Oxford University Press, 1983. Pp. xi, 406. Index. \$32.50, cloth; \$13.95, paper.

This third edition of Professor Brownlie's book is organized into eight parts, which correspond to the eight most important areas of the public

international law of peace. Each part contains one or several documents of major importance, drawn from various sources, such as treaties, declarations, resolutions and statements, which evidence the conventions between states or their practices. This latest edition reflects the recent changes brought to international law by new conventions and the developments of customary law.

The first part deals with international organizations. The second and third parts deal with the law of space: the second, with the law of maritime spaces and their exploitation, and the third, with the law of outer space. The law of the sea has assumed major importance on international agendas over the last decade, and this edition of the *Basic Documents* reflects the ambiguity of the present status of the existing international conventions in this area. Thus, it was necessary to add to the 1982 Law of the Sea Convention the four conventions of 1958, which were printed in the second edition. They are completed by the controversial Declaration of Principles Governing the Sea-bed and the Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, of 1970.

The fourth part expands on part 1 and deals with diplomatic relations. The fifth part is dedicated to an area of the law that recently has generated considerable controversy: international economic relations and permanent sovereignty over natural resources. The General Assembly resolution of 1962 on Permanent Sovereignty over Natural Resources, which appeared in the second edition, has been completed and updated by the controversial Charter of Economic Rights and Duties of States, of 1974.

The sixth part is entirely devoted to the problems of human rights and self-determination. The last two parts, like the first and fourth, focus on relations between states, but with regard to the principles governing the law of treaties and the judicial settlement of disputes between states.

*Basic Documents in International Law* is a nice, neat product, made to last and pleasant to use. The hard-cover edition is well finished, robust, elegant and very handy. The printing is clean and very easy to read. Brownlie's *Basic Documents in International Law* is a useful and well-conceived tool.

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*Repertório da Prática Brasileira do Direito Internacional Público*. 3 vols. By Antônio Augusto Cançado Trindade. Vol. I (1919–1940). Pp. 278; vol. II (1941–1960). Pp. 365; vol. III (1961–1981). Pp. 353. Brasília: Fundação Alexandre de Gusmão, 1984.

Much of the literature on public international law in this century has come from the Northern Hemisphere, in particular, the industrialized countries of Europe and North America. While South American countries have contributed significantly to the development of international law, there have been relatively few publications making the documentation available to the international community. Professor Trindade, from the University of Bra-

sília, has now published the first digest of public international law in South America. It provides superb, comprehensive documentation on Brazilian practice in international law in this century.

There are currently three volumes to the digest, covering the periods 1919–1940, 1941–1960 and 1961–1981. A fourth volume, covering the period 1899–1918, is in progress. Each volume is organized in the same manner; the same topics are covered in each, except for several significant additions and deletions for each period. This makes it easy to trace Brazilian practice on a particular international legal subject, such as treaties, recognition or state responsibility, for the entire period. To facilitate access further, a general analytical index for the four volumes is in preparation.

Each volume is divided into nine parts, which address the following topics: (1) fundamentals of international law (sources, basic principles governing friendly relations between states and codification); (2) international agreements; (3) conditions of states in international law (which covers rights and duties of states, recognition, state responsibility, jurisdictional issues and succession of states); (4) the regulation of spaces (including territories, oceans, international rivers, airspace and, in the last volume, outer space); (5) the status of international organizations in international law; (6) the status of the individual in international law; (7) dispute resolution; (8) armed conflict and neutrality; and (9) other themes (which range from the definition of aggression in the first volume to multinational corporations in the latest volume). Each part contains invaluable documentation on Brazilian practice, much of it not previously available, particularly in the early period.

The repertoire self-consciously makes the implicit statement that Brazil is becoming a great power with major international responsibilities. As such, it ought to have its own record of its practice in international law in order. The repertoire clearly explains this practice both to the Brazilians themselves and to the other states in the international community. It will be exceedingly useful to scholars, diplomats and practitioners of international law. Since it deserves to reach a broad audience, it would be useful to have the volumes, particularly the most recent one, available in either English or French, in addition to Portuguese.

EDITH BROWN WEISS

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*Integration im RGW (COMECON): Dokumente.* By Alexander Uschakow. Baden-Baden: Nomos Verlagsgesellschaft, 1983. Pp. 1127. DM 187.

This is the second edition of an earlier collection by the same author that appeared in 1972. The first edition dealt with the economic aspects of the Soviet plans for the socialist countries in the Council for Mutual Economic Assistance, as revealed in the so-called Complex Program for the Intensification and Improvement of Cooperation and the Development of Socialist Economic Integration of COMECON Member Countries, adopted in 1971. Since that time, a good deal of the planned integration has been given concrete form, in terms of both economic organizations and enterprises.

The 1983 collection is one of many similar efforts. There are several volumes of Russian documentation on the subject. The Secretariat of the Council of Mutual Economic Assistance published two volumes of the *Basic Documents of the COMECON* in 1976 and 1977. On the initiative of the Institute of State and Law of the USSR Academy of Science, four editions of the collection of documents appeared (in Russian) in 1967, 1972, 1976 and 1981, under the title (in English) "Multifaceted Economic Cooperation of Socialist States." They cover the same field of intra-COMECON relations and bring the COMECON documentation up to 1980. There is an East German edition of the same materials (1972) in two parts. Professor William E. Butler of the University of London produced a *Source Book on Socialist Economic Organizations* (1978), which was published in Holland by Sijthoff & Nordhoff, and somewhat earlier (1976) there appeared a monograph by R. Szawlowski, which included a collection of documents, also published by Sijthoff. Both Butler and Szawlowski include in the purview of Soviet bloc organizations the Warsaw Pact documentation, and Butler also includes the Danubian Convention of 1949.

Those who know Polish may use a collection prepared by Klepacki (Warsaw, 1981), *International Organizations of Socialist States*, which is limited to the economic relations of socialist states. The documentation is preceded by a comprehensive analysis of the system. Klepacki also provided an extensive bibliography on the subject, including Anglo-Saxon, German and French authors.

Uschakow's concentration on the economic aspects of intra-COMECON relations, excluding the military alliance side of the Soviet bloc, may be explained by two factors. In the first place, since the signing of the Warsaw Treaty in 1955, very little of significance has happened on the alliance side of the bloc. Its clauses as regards *casus foederis*, which suggest that its import is confined to Europe, are without material significance, as members of the Soviet bloc have materially supported military actions whenever the Soviet Union was involved (e.g., in North Korea and Vietnam). Otherwise, its actions were limited to political support of the policy line advocated by the Soviet Union. In the second place, after the demise of Stalin, concentration on economic ties between the members of COMECON and the Soviet Union has gained significance and strength, suggesting that earlier efforts to establish a "World Socialist System" had little effect. West German students of Soviet affairs see the process of integration as a movement that may eventually disrupt the German nation not only politically, but also economically. In that light, the intensification of the integrating process may frustrate West German efforts to maintain the economic and cultural unity of Germany.

The collection is organized in 12 parts, beginning with the documentation on the mechanism of the Council of Mutual Economic Assistance, which, established in 1949, lay dormant until 1959, when it finally received its statutes describing its purpose, functioning and organization. Since that time, it has been expanded to become, finally, either through organizational subordination or through a system of agreements with other economic organizations, the core of the economic side of the Soviet bloc. Part II deals with

special interstate organizations, which establish common agencies for scientific cooperation such as the Atomic Research Institute in Dubna, international banks, postal service, telecommunications (including Intersputnik—in the West, Intelsat), railways and water transport, the common use of containers in the international movement of goods, and so on.

Parts III and IV deal with the internal law of COMECON, which regulates various aspects of economic relations, including model provisions for establishing international economic associations, the general conditions of trade, delivery of plants and factories, servicing and spare parts. Special rules deal with contracts of specialization and cooperation in production, and the competence of the permanent commissions of COMECON as regards the execution of the Complex Program. Succeeding parts deal with frontier duties, double taxation, inventions, models and trademarks. Part VII contains general rules on arbitration of disputes arising out of the process of integration and cooperation, followed by two agreements regarding the construction of a cellulose factory in the Soviet Union, and general and long-term (until 1990) cooperation in the supply of power and energy to East European members of COMECON and to Mongolia.

Part IX includes COMECON's international agreements with nonmember countries, Yugoslavia, Finland and Mexico, and documents relating to negotiations between COMECON and the European Community. Parts X and XI include materials that outline the policy of integration, beginning with the Conference of the Party Chiefs in 1958, which led to the elaboration of the Principles of the Socialist Division of Labor, adopted in 1962, and three similar meetings of the Party and government heads, which produced, finally, the Complex Program of 1971. The Principles of 1962 and the Complex Program are reproduced *in extenso* in part XI.

Altogether, the collection includes some 90 documents and agreements between socialist nations that reach into the highest levels of authority. This mass of documents is the direct result of the fact that control of economic activity is the business of government. While in the West, governmental authorities provide a framework for economic activity, which is then filled by private initiative and a vast body of contracts, in the East, not only must legal and political frameworks be established by governments, but basic agreements to create common enterprises are also the responsibility of governments. Only within those limits may contractual relations to organize work and production take place.

Compared to the mechanism of the Common Market, COMECON represents an elaborate machinery with rigidly determined competences and no room for adjustment in the light of broader principles of law governing economic and business activities.

COMECON documentation continuously underscores the principle of national sovereignty and agreement in the process of integration. At the same time, in moments of important decisions, the sessions of the Council of Mutual Economic Assistance are meetings of the Party chiefs bound by different rules from those linking independent and sovereign nations. Fur-

thermore, permanent commissions of COMECON are increasingly being given additional powers of decision regarding the content and execution of the individual agreements for specialization and cooperation. In addition, COMECON includes meetings of department heads in charge of important aspects of government activity in the member states. Finally, although the 1971 program takes the form of a loose program for future action, a number of Soviet lawyers are of the opinion that it constitutes an international treaty, which somehow was adopted without the usual treaty-making process. One may suggest that contrary to what is being said officially, COMECON is a growing supergovernment with enormous potential for expanding its powers, reaching deeply into the economic life of the member states.

It is difficult to overemphasize the importance of Dr. Uschakow's collection. It is a reference tool for all those who are concerned in one way or another with the affairs of Eastern Europe, specialists and laymen alike, diplomats and economists.

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*Foreign Relations of the United States, 1952-1954, Volume II: National Security Affairs.* Part 1, Dept. of State Pub. 9391. Part 2, Dept. of State Pub. 9392. Washington: U.S. Govt. Printing Office, 1984. Pp. xxvi, 1928. Index in part 2.

This compilation, produced by the Office of the Historian of the Department of State, deals with broad issues of American national security policy during a critical post-World War II period. Like all volumes in the 1952-1954 *Foreign Relations* series, it bridges the last year of the Truman administration and the first 2 years of the Eisenhower administration. It focuses on fundamental developments—primarily concerned with external affairs but also involving internal relations. Reflecting the transition of administrations, it encompasses a wholesale review of basic policy and reorganization of the top-level policy coordination mechanism. Certain national security matters such as policy and diplomatic action related to the Korean War, the signing of the multipartite Southeast Asia Collective Defense Treaty (Manila Pact) in 1954 and the negotiation of the bipartite mutual defense treaties with Nationalist China, Japan, the Republic of Korea and the Philippines, as well as the actions of the North Atlantic Treaty Organization, are treated more fully in other *Foreign Relations* volumes.

Because this anthology concentrates on general policymaking and administration at a high level, rather than on particular areal or largely bipartite concerns, the documentation it encompasses differs from that presented in the customary *Foreign Relations* series. It incorporates not only Department of State records, but also those of the White House, the Department of Defense and many other agencies of the federal Government. It embodies a larger proportion of internal governmental memorandums, proposals and



reports, National Security Council (NSC) papers, other interagency exchanges and Department of State initiatives and commentaries, and quantitatively and qualitatively it is less concerned with diplomatic communications between the United States and other governments than is usually the case in these compendiums. As a consequence, it contributes more to explicating the functioning of the policymaking process than to elucidating bipartite and multipartite policy-implementation and intergovernmental negotiations.

This volume consists of two parts. The first (pp. 1-844) provides documentation on national security objectives, policies, procedures and programs, planning for threats to American security, the U.S. military posture as it relates to foreign policy and the structuring of national organization for dealing with policy formulation and coordination, particularly the mutation of the NSC system. Part 2 (pp. 845-1899) concentrates on two main topics: atomic energy and the regulation of armaments (745 pages), and the U.S. foreign information program (309 pages).

Part 1 deals with a broad spectrum of matters: the reassessment of overall U.S. goals and policies to ensure global security and continental defense (especially arrangements with Canada, including the joint early warning system to cope with trans-Arctic attack), the enhancement of the free world alliance, the possible outbreak of general war between the United States and the Soviet Union, and concrete policy issues. The latter concern economic and military assistance, mutual security, national mobilization, civil defense, relevant budgetary considerations and military force structure and the redeployment of American forces abroad.

So far as organization for national security policy-framing is concerned, much of the material in this part pertains to the structuring, functioning and operation of the NSC system, consisting of the NSC, its servicing Planning Board (for policy formulation) and Operations Coordinating Board (for monitoring policy implementation), its Executive Secretary and staff, and the emergent Special Assistant to the President for National Security Affairs. It also encompasses NSC substructure, embracing, by way of illustration, a proliferated network of subsidiary and supporting agencies such as the Committee on National Security, the Interdepartmental Intelligence Conference, the Intelligence Advisory Committee, the Board of National Estimates, the Psychological Strategy Board, the Committee on International Information Activities, an Ad Hoc Committee on Armaments and American Policy, and Special Committees on Atomic Energy and Thermonuclear War. In 1953 these were supplemented by "Project Solarium," headed by a working committee consisting of the Secretary of State, the Executive Secretary of the NSC and the Director of Central Intelligence. They were assisted by three task forces working at the National War College on plans for alternative policy approaches and strategies to govern U.S. relations with the Soviet Union. Contributory documentation from the Department of Defense, the Joint Chiefs of Staff, the Central Intelligence Agency, the Office of Defense Mobilization and the Mutual Security Agency is also incorporated.

As might be expected, this compendium therefore embodies such basic

documents as National Intelligence Estimates on the world situation (see pp. 551-62) and a variety of NSC "Documents": some 29 NSC topical numbered series consisting of memorandums and reports by the NSC and its Planning Board, staff studies, draft resolutions, and directives and other action papers. Also presented are reports on discussions at more than one hundred NSC meetings during which approximately 30 major national security topics were considered. Because of the sensitivity of these documents, many were originally classified as "top secret" and "secret," and occasionally some were additionally labeled "personal" or "eyes only." The following exemplify some of the more comprehensive, basic documents dealing with assessment, planning, substantive and procedural policy, strategy and tactics, and implementation: reports of the Executive Secretary of the NSC (pp. 20-53 and 577-97), reappraisals of U.S. objectives and strategy for national security (pp. 81-113 and 144-56), a "Key Data" book serving as a current ready guide to NSC programs (pp. 165-81), an NSC report on fundamental programs as related to their costs (pp. 307-16), a report on "Project Solarium" (pp. 399-434), an NSC draft statement on axial national security policy (pp. 808-22) and an NSC plan for continental defense (pp. 611-24).

The first segment of part 2—concerned with atomic energy and arms regulation policy—aside from providing Department of State, Department of Defense and NSC papers, presents documents related to the U.S. Atomic Energy Commission, a panel of consultants on disarmament and the Executive Committee on the Regulation of Armaments. These address the production of, responsibility for and managed use of fissionable materials, the construction and control of nuclear reactors in the United States and abroad, the sharing of technical atomic information with allies and the coordination of policy with Canada and the United Kingdom through the tripartite Combined Policy Committee and the Combined Development Agency (established under the Quebec Agreement signed by President Roosevelt and Prime Minister Churchill in 1943).

On armaments regulation policy, records pertain to armed force limitation, atomic/hydrogen and conventional weapons, internationally agreed disarmament and UN arms control machinery and deliberations, including the supersession of the original Atomic Energy and Conventional Armaments Commissions by a new combined Disarmament Commission. This change was mandated by a General Assembly resolution introduced by the United States, with the backing of the United Kingdom and France, and passed by overwhelming vote: The new commission was placed under the UN Security Council to prepare proposals for the international regulation of armaments and the control of atomic energy. One of the key subjects broached in this segment was President Eisenhower's "Atoms for Peace" proposal, which, after it was formulated and coordinated with British and French leaders at the tripartite Bermuda summit conference (dealt with in greater detail in volume V, part 2 of the *Foreign Relations* series), was presented by the President in his address to the UN General Assembly on December 8, 1953. Related documentation expounds U.S. planning for an international agency

to control nuclear energy production, use and safeguards, which eventually resulted in the creation of the International Atomic Energy Agency (whose Statute was signed in 1956 and entered into force the following year).

The second segment of part 2 focuses on policymaking respecting the U.S. International Information Administration and the U.S. Information Agency. Previously, two Department of State units—the Offices of International Information and Cultural Exchange—handled these responsibilities, in implementation of the International Information and Education Exchange Act (the Smith-Mundt Act passed in 1948). The new International Information Administration was created as a separate Department of State agency in January 1952 to manage the combined international information and educational exchange programs, and its Administrator was made responsible directly to the Secretary of State. Documentation on this agency deals with such matters as organization, functions, funding, problems of policy coordination with other units of the Department of State, congressional loyalty investigations and progress reports. This agency was short-lived, however, because Senator Joseph R. McCarthy pounced on it as an early target during his Communist-hunting campaign.

The U.S. Information Agency, on the other hand, launched early in 1953 (as provided for by President Eisenhower's Reorganization Plan No. 8), was established to promote understanding by foreign peoples of the objectives and policies of the United States. It combined the previous information programs of the Department of State, the Mutual Security Agency, the Technical Cooperation Administration and agencies concerned with U.S. governance of occupied territories. It became an independent administrative agency but, because its functions constituted an important component in the aggregate foreign relations machinery and activities of the United States, the Department of State maintained policy direction responsibilities for its conduct. Some of the key documents contained in this volume include an NSC directive defining the purpose of the agency, a statement of its mission, strategic principles to govern its functioning and reports of its operations. Finally, a comprehensive 80-page report to the President by his Committee on Information Activities—designated "Project Clean-Up"—is appended to this portion of part 2, supplemented by several documents that furnish commentary and discuss action on the report.

The compilers and editors of this volume assist its users by providing a number of well-prepared and useful aids: (1) a list of unpublished sources and primary materials that were consulted, including those of the Department of State, the Department of Energy and the U.S. Information Agency, together with the collections housed in the Truman and Eisenhower Libraries; (2) a list of some 165 abbreviations, symbols and acronyms employed in the documents; (3) a 12-page list of persons referred to, with their titles and positions; and (4) a comprehensive, carefully structured and indispensable 26-page, double-columned index. They also facilitate use of the compilation by incorporating many helpful descriptive, historical and cross-referencing notes to explain, interrelate and supplement the documents. As in the past,

they have brought to their task their customary superior standards of selection, organization, annotation and treatment of voluminous, complex and dispersed documentary resources and have distilled them for the public domain in a compact, reliable and readily usable way.

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*Foreign Relations of the United States, 1952–1954, Volume XV: Korea. Part 1, Dept. of State Pub. 9347. Part 2, Dept. of State Pub. 9348. Washington: U.S. Govt. Printing Office, 1984. Pp. xxix, 1997. Index in part 2.*

While maintaining the traditional level of selectivity, organization and treatment of the *Foreign Relations* series, this compendium is unique in several respects. It deals in considerable detail with U.S. policy and relations concerning a limited subject—the Korean War and its immediate aftermath—and it reveals important documentation pertaining to contingency planning that included atomic warfare. Also, like certain other volumes in the series, it focuses largely on central policymaking, involving the White House, the Vice President, the National Security Council (NSC) system, the Departments of State and Defense and the Joint Chiefs of Staff, the Central Intelligence Agency and the Mutual Security Agency and its successor, the Foreign Operations Administration.

The compilation consists of two parts. The first, covering the period from January 1952 to early June 1953 (pp. 1–1151), bridging the transition from the Truman to the Eisenhower administration, contains materials on the waging of the war and preliminary military armistice negotiations at Panmunjom. These negotiations were expected but failed to preclude political considerations, so attention is also paid to policy decisions regarding voluntary repatriation of prisoners of war, the role of the Soviet Union in any postarmistice conference on Korea and multipartite UN deliberations on the Korean question. Thus, while less attention is devoted to the technical aspects of the armistice, documentation also embraces the South Korean political crisis in the spring of 1952, U.S. contingency plans for Korea and the offer to negotiate a bilateral Mutual Defense Treaty with South Korea (which was signed in 1953 and implemented late the following year). Part 2, covering the 17 months to the end of 1954 (pp. 1152–956), concentrates on the consummation of the Korean armistice, postarmistice issues including the “Joint Declaration of Policy on Korea” (called the “Greater Sanctions Statement,” signed on July 27, 1953—see pp. 1152–445), final negotiations and signing of the armistice, reconstruction, treatment of remaining nonrepatriated prisoners of war, general problems in U.S.-Korean affairs, the shift of negotiations from Panmunjom and preparations for the multipartite Ge-

neva Conference of 1954 (treated in detail in vol. XVI of the *Foreign Relations* series for 1952-1954, pp. 1-394).<sup>1</sup>

Among the topics relating to the conduct of the Korean War given notable attention are such matters as Communist Chinese, Korean, Soviet and U.S. objectives, possible direct intervention by the People's Republic of China or the Soviet Union, military capabilities of the two warring sides, casualties and troop morale, logistics and air support, exchange of sick and wounded prisoners of war (called "Operation Little Switch"), the screening and segregation of nonrepatriates (designated "Operation Scatter"), and military contingency plans (encompassing "Plan Everready," which is outlined on pages 965-68). One proposal incorporated into U.S. planning, raised by President Eisenhower in the NSC in March 1953, provided for possible resort to atomic warfare to achieve a victory or at least a compromise settlement or, if war should recommence after an armistice, to be an option should the political conference fail. This consideration constituted a part of "Project Solarium," which is examined in greater detail in volume II of the 1952-1954 *Foreign Relations* series on National Security Affairs.<sup>2</sup> Segments dealing with the Korean armistice contribute extensive documentation on negotiation positions, policies, reactions and strategies of the participating governments, details pertaining to the negotiation machinery and process, armistice-signing procedures and a variety of substantive problems: the demarcation line, the demilitarized zone and the treatment of prisoners of war.

Documents regarding other U.S. relations with the Republic of Korea embrace the critical internal political situation (corruption, the assassination attempt on President Syngman Rhee, the dispute with his National Assembly, the imposition of martial law and a constitutional crisis over South Korea's presidential election), possible United Nations Command intervention in Korea's internal affairs (shelved following the election of Rhee), American economic and military assistance, and a number of postarmistice problems. Focusing on Korea as a whole, substantial documentation is devoted to the unification issue, including the positions of the two Chinas, Japan, the two Koreas and the Soviet Union, in addition to the United States, the proposals of several uninvolved countries, UN discussions and resolutions and policy and negotiations that were preludes to the Geneva Conference.

Because much of this anthology concerns interagency policy formulation, it provides considerable material pertaining not only to the Department of State but also to policy coordination within the NSC system, including Council deliberations and the activities of the NSC Planning Board and Operations Coordinating Board. Of value to researchers are the texts of National Intelligence Estimates on "Communist Capabilities" and "Probable Courses of Action in Korea" (NIE No. 55 of 1952 and NIE No. 80 of 1953, given on pages 436-46 and 865-77), a number of Special Estimates and reference to some 19 NSC documents, several of which are presented verbatim with

<sup>1</sup> Reviewed at 76 AJIL 467-68 (1982).

<sup>2</sup> Reviewed in this issue at pp. 1135-39.

their addendums, enclosures and Department of State commentary. Also of significance are papers prepared by the Executive Secretary of the NSC and the memorandums of discussion of interagency and NSC sessions.

Those interested in the high-level aspects of policymaking and diplomacy will find that this volume embodies documentation on President Truman's meeting with Prime Minister Churchill in Washington in January 1952 (at which Korea was a primary topic of conversation), President Truman's transition meetings with President-elect Eisenhower (also dealt with in greater detail in vol. I, part 1, of the 1952-1954 *Foreign Relations* series, pp. 1-44),<sup>3</sup> Eisenhower's preinaugural trip to Korea in December 1952, Chief of Staff of the Korean Army General Paek Sun-Yop's visit to Washington in May 1953, Acting Prime Minister Paik Tu Chin's visit to the United States in June 1953 to discuss Korea's economic needs, Secretary of State John Foster Dulles's trip to Korea in August 1953 to confer on the impending Geneva Conference, Vice President Nixon's trip to Korea in November 1953 to deliver a letter from President Eisenhower and acquire an explicit written assurance that President Syngman Rhee would not renew the war to unite Korea by force, President Eisenhower's tripartite Bermuda meeting in December 1953 with the leaders of France and the United Kingdom, and, following the failure of the Geneva Conference, President Rhee's visit to the United States in July 1954 to seek tangible continuing support from the United States.

Users of this compilation are assisted by the many helpful descriptive, explanatory and cross-referencing notes provided by its editors; some of these supply direction to the location of related documents and specific archival resources. Textual content is supplemented by a number of useful aids: (1) a lengthy list of abbreviations, symbols and code names with succinct explanations; (2) a list of approximately 225 American and foreign officials with their titles and assignments; and (3) a comprehensive list of sources, embracing the unpublished papers of the Departments of State and Defense, the National Archives and the libraries and other collections of Presidents Truman and Eisenhower, Secretary Dulles and others, located outside Washington, as well as a short list of both official and unofficial published sources. Because this compendium is organized in a small number of lengthy agglomerated sections, within which documents are arranged chronologically, the table of contents affords little guidance to specific content. Users of the volume, therefore, will find the 39-page, double-columned, carefully structured index to be indispensable.

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## BRIEFER NOTICES

*Hugo Grotius: 1583-1983.* (Maastricht, Hugo Grotius Colloquium, March 31, 1983.) By J. L. M. Elders, A. C. Eyffinger, Chr. Gellinek, B. Kwiatkowska

<sup>3</sup> Reviewed at 79 AJIL 857-60 (1985).

and J. C. M. Willems. Published under the auspices of the Faculty of Law, University of Limburg. (Assen: Van Gorcum, 1984. Pp. ix, 62. Dfl.15.) In honor of the 400th anniversary of the birthday of Hugo Grotius in 1583, the research committee of the Faculty of Law at the University of Limburg in the Netherlands undertook the initiative to organize a colloquium on the present-day significance of Hugo Grotius. This slim volume contains the papers presented at that conference. The topics covered include Grotius and international law, *mare liberum*, good faith and equity in Grotius's doctrine with respect to civil law obligations, a review of the sorry state of Grotian historiography and two pieces dealing with the personal side of Grotius. Although most regretfully all too short, this collection of brief essays is well worth the time and effort to acquire and read.

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*Minority Rights: A Comparative Analysis.* By Jay A. Sigler. (Westport and London: Greenwood Press, 1983. Pp. x, 245. Index. \$29.95.) This book is a timely reminder that the issue of minority rights continues to be of significant importance despite the secondary position it has occupied ever since World War II on a UN agenda where prominence has been given to non-discrimination and self-determination. There is an interesting attempt by the author to define a minority (p. 5); the study likewise terminates with a useful but unenviable endeavor to sketch out a preliminary theory of minority rights (pp. 195-96), which, unlike the definition of Capotorti, is not circumscribed by politically acceptable norms developed by UN member states.

The book provides a convenient historical overview of how minorities have been protected on the international plane, of minority rule (the leading example being that of the Republic of South Africa), a chapter on a number of national arrangements to protect minority rights (among them, those of the USSR, Belgium and India; and two failures: Lebanon and Cyprus) and chapters on affirmative action and antidiscrimination policies, finishing with a reminder that the most recent serious study of minority rights prior to the present effort is now more than two decades old. The study is completed with a rather disappointing nine-page "capsule survey of minority rights" and a very useful annotated bibliography on the subject.

Professor Sigler notes that theoretical problems such as the means for legitimating a group's assertion of minority status must await the passage of time and the gaining of experience and suggests that an inductive approach derived from the enlightened practice of leading nations may be more appropriate and fruitful. This comment comes at an opportune time in that the London-based Minority Rights Group NGO is currently preparing an in-depth comparative survey on the legal situation and human rights of minorities (a study sponsored by the United Nations University).

ANDREW DRZEMCZEWSKI

*Strasbourg, France*

*New Development of International Law in Recent Times.* By Samuel Shih-Tsai Chen. (Beijing: Youyi Chuban Gongsi (Friendship Publishing Company), 1983. Pp. 60. PRC \$.56. In Chinese.) This slim volume consists of the bare outlines of a series of eight lectures delivered by the author, a Chinese-

American professor, when he visited the People's Republic of China in May 1982. Each chapter corresponds to one lecture. Following an introduction, the lectures deal with space law, the law of the sea, environmental protection, the law of treaties, the law of international relations, international organizations and the laws of war. For the obvious reason of avoiding politically sensitive topics, recent developments on the international protection of human rights and state immunity are conspicuous omissions (although there is a brief section in chapter 6 on diplomatic immunity). This book is published by the author's host country.

For reasons seemingly inexplicable, not every lecture is accompanied by references; but whenever citations are made, they are not of up-to-date works. Even more surprisingly, no mention is made of the major textbooks and case books widely used in U.S. and English law schools such as Brownlie; O'Connell; McDougal and Reisman; Sørensen; Akehurst; Leech; Oliver and Sweeney; Harris, Henkin, Pugh, Schachter and Smit; and others. There is no index or glossary of legal terms with translation.

Even in some of the lectures, topical issues are omitted; e.g., in the chapter on war, the author does not discuss arms control and disarmament or raise the interesting doctrine of anticipatory self-defense. Of all these lectures, it seems that the one on the law of treaties is the most comprehensive and succinct. In sum, this book is nothing more than a skeletal framework.

If the author's pedagogical objective is to introduce Western public international law to a Chinese audience, his mission can only be described as incomplete because it is marred by a biased sampling of subject matters. One would liken this book to a guide distributed to a visitor at the entrance of a natural science museum!

FRANKIE FOOK-LUN LEUNG  
*Of the Hong Kong Bar*

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\* Mention here neither assures nor precludes later review.



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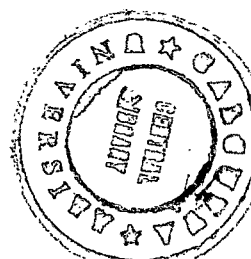
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# INTERNATIONAL LEGAL MATERIALS\*

## CONTENTS

VOL. XXIV, NO. 3 (May 1985)

PAGE

### TREATIES AND AGREEMENTS

China: <i>Bilateral Investment Promotion Treaty Program</i>	
Introductory Note .....	537
Belgium-Luxembourg Economic Union-China: Agreement for the Reciprocal Promotion and Protection of Investments .....	538
China-France: Agreement concerning the Reciprocal Encouragement and Pro- tection of Investments .....	550
Ecuador-United States: <i>Investment Guaranty Agreement</i>	
Introductory Note .....	566
Exchange of Notes .....	567
European Economic Community-African, Caribbean, and Pacific Countries: Documents from <i>Lomé III Meeting</i> .....	571
Final Act and Declarations .....	574
Third ACP-EEC Convention of Lomé .....	588
Israel-United States: <i>Free Trade Area Agreement</i> .....	653
Background .....	654
Overview of the Agreement .....	654
Text of the Agreement .....	657
Letters of Understanding .....	675
Declaration on Trade in Services .....	679
Tariff Package .....	681
Implementing Legislation .....	683
U.S. Offer for Product Staging .....	685
Israeli Offer for Product Staging .....	686
World Bank: Draft Convention Establishing the <i>Multilateral Investment Guarantee Agency</i>	
Introductory Note .....	688
Draft Convention .....	692

### REPORTS

General Agreement on Tariffs and Trade: Report of Eminent Persons on <i>Problems Facing the International Trading System</i> .....	716
--	-----

### JUDICIAL AND SIMILAR PROCEEDINGS

Switzerland: Supreme Court Opinion in the <i>Second Santa Fe Case concerning Judicial Assistance</i> .....	745
United States:	
Court of Appeals for the Second Circuit Decision on Rehearing in <i>Allied Bank v. Banco Credito Agricola de Cartago, et al. (Act of State Doctrine; External Debt Renegotiation; Payment of Default on Promissory Notes)</i> .....	762
Supreme Court—Amicus Curiae Briefs Submitted in <i>Matsushita Electric Indus- trial Co., et al. v. Zenith Radio Corporation, et al. (U.S. Antitrust Laws; Japanese Trade Policies; Voluntary Export Restraints)</i>	
Brief for the United States .....	769
Brief for Japan .....	781

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## LEGISLATION AND REGULATIONS

Canada: <i>Foreign Extraterritorial Measures Act</i> .....	794
China:	
<i>Foreign Economic Contract Law</i> , with Introductory Note .....	797
Regulations on Controlling Technology Import Contracts .....	801
Regulations providing <i>Penal Provisions for Violations of the Exchange Control Regulations</i> .....	804
Democratic People's Republic of Korea: <i>Joint Venture Law</i> , with Introductory Note	806
United States:	
<i>Economic Sanctions against Nicaragua</i>	
Executive Order Prohibiting Trade and Message to Congress .....	809
Statement to the Press .....	810
Diplomatic Notes concerning Economic Sanctions and Termination of FCN Treaty .....	811
Department of the Treasury, Office of Foreign Assets Control Regulations	817
<i>Trade and Tariff Act of 1984</i> , with Introductory Note .....	823

## OTHER DOCUMENTS

Canada-France-Federal Republic of Germany-Italy-Japan-United Kingdom-United States-European Community: Documents from the <i>Bonn Summit</i> .....	878
European Community: Council Declaration on a <i>New Round of Trade Negotiations</i> ..	883
International Monetary Fund-World Bank: Documents from September 1984 and April 1985 Meetings	
Interim Committee Communiques on <i>Fund Resources, Debt Reschedulings and Review of Monetary System</i> .....	886
Development Committee Communiques on <i>Aid to Africa, Growth for Developing Countries and Rollback of Protectionism</i> .....	892
Group of Ten Communiques on <i>Reviewing Monetary System</i> .....	896
Group of Twenty-four Communiques on <i>Lending, Reform and Debt Problems</i> ..	897
Organisation for Economic Co-operation and Development:	
Communique on the <i>Economic Situation</i> .....	906
Declaration on <i>Transborder Data Flows</i> .....	912
United Nations General Assembly Resolutions:	
On <i>Consumer Protection</i> .....	914
On the <i>Critical Economic Situation in Africa</i> .....	922
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS A PARTY	928
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS NOT A PARTY	933
NOTICE OF OTHER DOCUMENTS (not reproduced) .....	934

## VOL. XXIV, No. 4 (July 1985)

## LEGISLATION AND REGULATIONS

Cayman Islands: <i>Narcotic Drugs (U.S. Evidence) Law</i> .....	937
Federal Republic of Germany: Law on <i>International Assistance in Criminal Matters</i> ..	945
Italy: Law on the <i>Exploitation of the Mineral Resources of the Deep Seabed</i> .....	983
Peru: <i>Private International Law</i> in New Civil Code of 1984, with Introductory Note	997
United States:	
1984 Act to Combat <i>International Terrorism</i> .....	1015
New York Statute Amendments concerning <i>Reference to New York Law and New York Arbitration in International Agreements</i> , with Introductory Note .....	1019

## JUDICIAL AND SIMILAR DECISIONS

International Centre for Settlement of Investment Disputes Arbitral Tribunal: Excerpts of <i>Award on the Merits</i> in Arbitration between Amco Asia Corporation <i>et al.</i> and Indonesia .....	1022
---	------

Netherlands: District Court of Amsterdam Decision in Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt ( <i>Enforcement of Foreign Arbitral Award against a State</i> ), with Introductory Note .....	1040
United States:	
Introductory Note to <i>Braka v. Bancomer, S.N.C. and Callejo v. Bancomer, S.A. (U.S. Foreign Sovereign Immunities Act; Act of State Doctrine)</i> .....	1046
Court of Appeals for the Second Circuit Decision in <i>Braka v. Bancomer, S.N.C.</i> .....	1047
Court of Appeals for the Fifth Circuit Decision in <i>Callejo v. Bancomer, S.A.</i>	1050
Supreme Court Decision in <i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (International Arbitration; Exception to Arbitrability of Antitrust Denominated Disputes in International Commercial Relationships)</i> .....	1064
TREATIES AND AGREEMENTS	
Canada-United States: Treaty on Mutual Legal Assistance in Criminal Matters .....	1092
China-Union of Soviet Socialist Republics:	
Agreement on Economic and Technical Cooperation .....	1100
Agreement concerning Creation of the Soviet-Chinese Commission for Economic, Commercial, and Scientific-Technical Cooperation .....	1101
Agreement on Scientific-Technical Cooperation .....	1102
United Kingdom-United States:	
Extradition Treaty Supplement Limiting Scope of Political Offenses to Exclude Acts of Terrorism .....	1104
Agreement concerning Obtaining Evidence from Cayman Islands with regard to Narcotics Activities .....	1110
OTHER DOCUMENTS	
Euro-Arab Chambers of Commerce: Rules of Conciliation, Arbitration and Expertise, with Introductory Note .....	1119
London Court of International Arbitration: Revised Rules, with Introductory Note	1137
United Nations: General Assembly Resolutions	
On International Campaign against Traffic in Narcotic Drugs, with Draft Convention	1157
On Declaration on Control of Drug Trafficking and Drug Abuse .....	1165
On International Campaign against Traffic in Drugs .....	1167
REPORTS	
United Nations: Secretary-General's Report on International Campaign against Traffic in Drugs .....	1170
United States: Excerpts of Report of Secretary of State's Advisory Panel on Overseas Security .....	1175
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS A PARTY	1184
RECENT ACTIONS REGARDING TREATIES TO WHICH THE UNITED STATES IS NOT A PARTY	1185
NOTICE OF OTHER DOCUMENTS (not reproduced) .....	1186

## TABLE OF CASES

(*Italicized* page numbers indicate where decisions are excerpted or cases discussed at length. Abbreviations: arb., arbitration; IACHR, Inter-American Court of Human Rights; ICJ, International Court of Justice; PCIJ, Permanent Court of International Justice.)

- Administrative Decision No. III (arb.), 47  
Aerial Incident of 27 July 1955 (ICJ), 425, 429  
Airline Pilots Association, International v. TACA International Airlines, S.A., 737-40  
Alcom Ltd. v. Republic of Colombia, 143-5, 149  
Alfred Dunhill of London, Inc. v. Republic of Cuba, 77-8, 90, 718, 776  
Allied Bank International v. Banco Credito Agricola de Cartago, 149, 733-5, 1055  
American Cetacean Society v. Baldrige, 438  
American International Group, Inc. and American Life Insurance Co. v. Islamic Republic of Iran and Central Insurance of Iran (arb.), 419  
AMINOIL award. *See* Kuwait and American Independent Oil Co.  
Amministrazione delle Finanze dello Stato v. Simmenthal, S.p.A., 612  
Anglo Chinese Shipping Co. v. United States, 135, 136-7, 1062  
Anglo-French award. *See* United Kingdom-France Continental Shelf  
Anglo-Iranian Oil Co. (ICJ), 1019, 1020  
Appeals from Certain Judgments of the Hungarian-Czechoslovak Mixed Arbitral Tribunal (PCIJ), 1018  
ARAMCO award. *See* Saudi Arabia v. Arabian American Oil Co.  
Arbitral Award made by the King of Spain on 23 December 1906 (ICJ), 653  
Ailee v. Laird, 954  
Attorney-General (Canada) v. Attorney-General (Ontario), 640  
Baker v. Carr, 75, 91, 450, 718, 747, 952-3, 954  
Bancec case. *See* First National City Bank v. Banco para el Comercio Exterior de Cuba  
Banco Nacional de Cuba v. Chase Manhattan Bank, 459, 460  
Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 458-60  
Banco Nacional de Cuba v. Farr, 958  
Banco Nacional de Cuba v. First National City Bank, 77, 89-90, 459, 460  
Banco Nacional de Cuba v. Sabbatino, 68-91, 718, 719, 720, 740, 774-5, 958  
Barcelona Traction (ICJ), 425, 998  
Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 72, 83, 89, 90, 458-60  
Bethlehem Steel Corp. v. United States, 137-9  
Bolling v. Sharpe, 159  
Braka v. Bancomer, S.N.C., 1054-5  
Brandenburg v. Ohio, 121  
[The] Bremen v. Zapata Off-Shore Co., 753  
Briggs & Stratton Corp. v. Baldrige, 149  
British Airways Board v. Laker Airways Ltd., 141-3  
Buttes Gas & Oil Co. v. Hammer, 88-9  
Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A., 149  
Certain Expenses of the United Nations (ICJ), 384  
Certain Norwegian Loans (ICJ), 393, 1024-5  
Chorzów Factory (PCIJ), 415-6, 1042  
Clayco Petroleum Corp. v. Occidental Petroleum Corp., 149  
Commonwealth v. Tasmania, 633-40  
Conditions for Admission to Membership in the United Nations (ICJ), 383-4  
Consorzio agrario della Tripolitania v. Federazione italiana consorzi agrari e Cassa di risparmio della Libia, 337-8  
Constitutional Complaints of the National Iranian Oil Co., 322-3  
Corfu Channel (ICJ), 366, 429, 994, 1018-9, 1020-1, 1023, 1024  
Corporacion del Cobre v. Societé Braden Copper Corp., 323-4  
Corporacion Venezolana de Fomento v. Vintero Sales Corp., 458  
Costa v. ENEL, 609-10  
Crockett v. Reagan, 955-6  
Currin v. Wallace, 919-20  
Dames & Moore v. Regan, 84-5, 744  
De Sabla case (arb.), 418



- EEOC v. Allstate Insurance Co., 930  
 Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75) (IACHR), 4, 13-4, 19, 20-3  
 Electricity Co. of Sofia & Bulgaria (PCIJ), 1026  
 Engel v. Vitale, 718  
 Erie Railroad v. Tompkins, 621  
 Exchange National Bank of Chicago v. Empresa Minera del Centro del Peru S.A., 751  
 Filartiga v. Pena-Irala, 98, 104, 160, 1067, 1069  
 First National City Bank v. Banco para el Comercio Exterior de Cuba, 149, 447-8, 718, 778  
 Fisheries Jurisdiction (ICJ), 554  
 Frolova v. Union of Soviet Socialist Republics, 1057-9  
 Frontini v. Ministro delle Finanze, 610-1, 613  
 Garcia v. Chase Manhattan Bank, N.A., 454-6, 1055  
 Geoffroy v. Riggs, 119  
 Gibbons v. Udaras na Gaeltachta, 330-3  
 Goldenberg case (arb.), 417  
 Goldwater v. Carter, 450, 685-6, 687, 1061  
 Gould Marketing, Inc. v. Ministry of Defence of Iran (arb.), 148-9  
 Government of Costa Rica (In the Matter of Viviana Gallardo, *et al.*) (IACHR), 19  
 Greenham Women against Cruise Missiles v. Reagan, 746-9  
 Guinea/Guinea-Bissau maritime boundary (arb.), 961  
 Gulf of Maine (ICJ), 539-77, 578-97, 961-91  
 Haitian Refugee Center, Inc. v. Gracey, 744-6  
 Handel v. Artukovic, 1067-9  
 Hannevig case, 684  
 Harris v. VAO Intourist Moscow, 329-30  
 Hawaii Housing Authority v. Midkiff, 136  
 Haya de la Torre (ICJ), 1009, 1012, 1029, 1030, 1031  
 Hilton v. Guyot, 78  
 Hostages case. *See* United States Diplomatic and Consular Staff in Tehran  
 Hunt v. Mobil Oil Corp., 774  
 Immigration and Naturalization Service v. Chadha, 149, 912-60  
 Interhandel (ICJ), 376, 377, 1025  
 International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 324-6, 327, 774  
 International Shoe Co. v. Washington, 783  
 Iranian Hostages case. *See* United States Diplomatic and Consular Staff in Tehran  
 Jackson v. People's Republic of China, 150, 456-8, 743  
 Jurisdiction of the ICAO Council (ICJ), 1017  
 Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia, 78  
 King of Spain case. *See* Arbitral Award made by the King of Spain on 23 December 1906  
 Koowarta v. Bjelke-Petersen, 626-33, 634, 635, 638-9, 640  
 Kuwait and American Independent Oil Co. (arb.), 418-9, 421  
 Lake Lanoux (arb.), 366, 367, 767  
 Laker Airways Ltd. v. Pan American World Airways, 1062-71  
 Laker Airways Ltd. v. Sabena, Belgian World Airlines, 143  
 Langenegger v. United States, 135-7, 1060-3  
 Letelier v. Republic of Chile, 447-9  
 LIAMCO award. *See* Libyan American Oil Co. v. Government of the Libyan Arab Republic  
 Libyan American Oil Co. v. Government of the Libyan Arab Republic (arb.), 340, 418  
 Libyan Arab Jamahiriya-Malta Case concerning the Continental Shelf (ICJ), 961  
 Lotus case (PCIJ), 103  
 Luftig v. McNamara, 954  
 McDonnell Douglas Corp. v. Islamic Republic of Iran, 751-4  
 McKeel v. Islamic Republic of Iran, 150  
 Maltina Corp. v. Cawy Bottling Co., 739  
 Maritime International Nominees Establishment v. Republic of Guinea, 333  
 Matter of SEDCO, 326-8  
 Matter of the Republic of the Philippines, 144  
 Military and Paramilitary Activities in and against Nicaragua (ICJ), 373-8, 379-84, 385, 386, 388, 389, 391, 394, 397, 398-9, 402, 404, 423-30, 438-41, 442-6, 597, 652-7, 657-8, 662, 682, 685, 992-1005, 1005-36  
 Miranda v. Arizona, 718  
 Missouri v. Holland, 623, 640  
 Mitchell v. Laird, 954-5  
 Morrison-Knudsen Pacific Ltd. v. Ministry of Roads & Transportation (arb.), 146-8  
 Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 134  
 Myers v. United States, 917  
 Nicaragua v. United States. *See* Military and Paramilitary Activities in and against Nicaragua  
 North Sea Continental Shelf Cases (ICJ), 140, 397, 544, 550, 559, 566, 568, 574, 580-1, 586, 880-1, 884, 887, 966, 967, 982

- Morwegian Shipowners Claims (arb.), 416  
 Nuclear Pacific, Inc. v. United States Department of Commerce, 460-2  
 Nuclear Tests (ICJ), 653, 685, 1012-3, 1019  
 N.V. Cabolent v. NIOC, 322  
 O'Connell Machinery Co. v. M.V. Americana, 150  
 Orlando v. Laird, 954, 955  
 Osborn v. Bank of the United States, 780  
 "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights) (IACHR), 5-6, 11, 18, 20  
 Oyama v. California, 159  
 Fain v. United Technologies Corp., 751  
 Fajzs, Csáky, and Esterházy (PCIJ), 1018  
 [The] Paquete Habana, 78-9  
 Fauling v. McNamara, 748  
 Ferez v. Chase Manhattan Bank, N.A., 455-6  
 Fersinger v. Islamic Republic of Iran, 150  
 Fosphates in Morocco (PCIJ), 1018  
 Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (IACHR), 12-3, 14-5, 16-7, 19  
 Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, 1059-60  
 E. v. Burgess, *ex parte* Henry, 624-5  
 Ramirez v. Weinberger, 137, 449-52, 956-7  
 Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland, 139-41  
 Reid v. Covert, 126, 159  
 Reparation for Injuries Suffered in the Service of the United Nations (ICJ), 882  
 Republic of Mexico v. Hoffman, 76  
 Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights) (IACHR), 9-11, 17-8, 23-5  
 Richards v. Secretary of State, 1063-5  
 Right of Passage over Indian Territory (ICJ), 376, 377-8, 428  
 Rios v. Marshall, 326  
 Roberts v. United States Jaycees, 294  
 Rodriguez-Fernandez v. Wilkinson, 160  
 Sanchez-Espinoza v. Reagan, 956  
 Santa Fe case. *See* Securities and Exchange Commission v. Certain Unknown Purchasers  
 Santovincenzo v. Egan, 119  
 Sapphire International Petroleum Ltd. v. National Iranian Oil Co. (arb.), 322  
 Saudi Arabia v. Arabian American Oil Co. (arb.), 319  
 Scherk v. Alberto-Culver Co., 753  
 Schmidt v. Polish People's Republic, 742-4  
 Securities and Exchange Commission v. Certain Unknown Purchasers, 722-5  
 Shanghai Power Co. v. United States, 150  
 Shelley v. Kraemer, 83-4, 159  
 Sibbach v. Wilson & Co., 937  
 Siderman v. Republic of Argentina, 1065-7  
 Società industrie chimiche Italia Centrale v. Ministero commercio con l'estero, 611-2, 613  
 Société Eurodif v. République Islamique d'Iran, 333-5  
 Société Hôtel George V v. Etat Espagnol, 328-9  
 South West Africa Cases (ICJ), 998-1001  
 S.p.a. Granital v. Amministrazione finanziaria, 598, 600, 613-5, 621  
 Spanish Zones of Morocco (arb.), 417-8  
 S.S. Wimbledon (PCIJ), 50, 1029  
 Steel Seizure. *See* Youngstown Sheet & Tube Co. v. Sawyer  
 Sumitomo Shoji America, Inc. v. Avagliano, 741-2  
 Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 739  
 Tai Ping Insurance Co. v. M/V Warschau, 133-5  
 Takahashi v. Fish & Game Commission, 159  
 Tel-Oren v. Libyan Arab Republic, 92-105, 105-7, 112, 150  
 Temple of Preah Vihear (ICJ), 427  
 Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic (arb.), 319  
 Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 782-3  
 Timberlane Lumber Co. v. Bank of America National Trust & Savings Association, 735-7  
 TOPCO award. *See* Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic  
 Trail Smelter (arb.), 366, 367  
 Transamerican Steamship Corp. v. Somali Democratic Republic, 749-51  
 Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 712  
 Tunisia/Libya Arab Jamahiriya Case concerning the Continental Shelf (ICJ), 544, 566, 568, 575, 576, 581, 586, 596, 966, 967, 969, 972, 975, 985-6, 1037  
 Tunis Nationality Decrees (PCIJ), 50-1  
 Turney v. United States, 1062  
 Underhill v. Hernandez, 719  
 United Kingdom-France Continental Shelf (arb.), 545, 553, 554, 566, 574, 586, 969, 975

- United States Diplomatic and Consular Staff  
in Tehran (ICJ), 386, 395, 404, 430, 658,  
994-5, 1002, 1036
- United States v. Ballin, 943
- United States v. Bowers and Mathews, 109
- United States v. Core Laboratories, Inc.,  
1055-6
- United States v. Curtiss-Wright Export Corp.,  
932
- United States v. Klintock, 108-9
- United States v. McLean, 752-4
- United States v. Palmer, 109
- United States v. Postal, 157
- United States v. Reagan, 130
- United States v. Wiltberger, 109
- Vance v. Terrazas, 1064
- Verlinden B.V. v. Central Bank of Nigeria,  
94, 779-81, 1060
- Vishipco Line v. Chase Manhattan Bank, N.A.,  
455
- Waterside Ocean Navigation Co. v. Interna-  
tional Navigation Ltd., 132-3
- Wickes v. Olympic Airways, 740-2
- Williams v. Suffolk Insurance Co., 88-9
- World-Wide Volkswagen Corp. v. Woodson,  
783
- Yakus v. United States, 932
- Youngstown Sheet & Tube Co. v. Sawyer, 450,  
686-7, 953
- Zemel v. Rusk, 932

## INDEX

(The following abbreviations refer to sections of the *Journal*: *Ag.*, Agora; *BN*, Briefer Notices; *BR*, Book Reviews and Notes; *CD*, Current Developments; *Corr.*, Correspondence; *CP*, Contemporary Practice of the US Relating to International Law; *Ed.*, Editorial Comments; *JD*, Judicial Decisions; *LA*, Leading Article; *NC*, Notes and Comments. Other abbreviations include: EEC, European Economic Community; FCN Treaty, Treaty of Friendship, Commerce and Navigation; FSIA, US Foreign Sovereign Immunities Act; ICJ, International Court of Justice; ILC, International Law Commission; IWC, International Whaling Commission; LOS, law of the sea; PCIJ, Permanent Court of International Justice; PRC, People's Republic of China; UK, United Kingdom; UNCLOS III, Third United Nations Conference on the Law of the Sea; US, United States; USSR, Union of Soviet Socialist Republics.)

- ABM Treaty (1972), 53
- (The) Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience, *Ed.*, 641
- Act of state doctrine, 95-6, 344, 451, 957-8: control over natural resources and, 324-6; and counterclaims arising from expropriation, *JD*, 458-60; as defense under FSIA, 774-6, 781, 782; and liability of US bank for deposits in foreign branches, *JD*, 454-6; in revised *Restatement* of US foreign relations law, *LA*, 68; *Corr.*, 717; situs of obligations and, *JD*, 733-5; *JD*, 1054-5; territorial limitations, *JD*, 737-40
- Adatci, Mineichiro, and PCIJ's Optional Clause, 31
- (The) Advisory Practice of the Inter-American Human Rights Court, *LA*, 1
- African countries, 901, 904
- Agarwal, H. O. Implementation of Human Rights Covenants with special reference to India, *BR*, 196
- Ago, Roberto, 373, 1006: and *Gulf of Maine* case, 543, 545-6, 552, 554, 566, 582-3, 973
- Agora: What Does Tel-Oren Tell Lawyers?, 92; What Price Expropriation?, 414
- Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty, 1979). *See* Moon Treaty
- Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space (Rescue and Return Agreement, 1968), 163
- Aickin, Keith A., on implementation of treaties in Australia, 629
- Aircraft, Convention for the Suppression of Unlawful Seizure of (1970), 1046
- Aissi, Said. *See* Shihata, Ibrahim F. I.
- Akehurst, Michael, on customary international law, 663
- Akinsanya, Adeoye A. Multinationals in a Changing Environment: A Study of Business-Government Relations in the Third World, *BR*, 829
- Aksen, Gerald. *BR* of Sanders, 1129
- Albania, 994, 1018-9
- Alexander, Lewis M. *BR* of Brooks, 491
- Ali, Mehdi. *See* Shihata, Ibrahim F. I.
- Aliens: Cuban-US agreement for return of boatlifted Cubans, *CP*, 431-2; Cuban suspension of operation of agreement, *CP*, 1044-5; under Racial Discrimination Convention, 311-3; US interdiction of on high seas, *JD*, 744-6
- Almond, Harry H., Jr. *BR* of Bos, 793; *BR* of Dupuy, 1091; *BR* of Friedlander, 842; *BR* of Green, 1095; *BR* of Wells, 202
- Alston, Philip, proposals on new human rights, 676
- American Bar Association, 119: and Moon Treaty, 165-7; proposals to amend FSIA, 770
- American Civil Liberties Union, 121
- American Convention on Human Rights, 1072: advisory practice of Court under, *LA*, 1

- American Declaration of the Rights and Duties of Man, Inter-American Court's jurisdiction to interpret, 7-8
- American Foreign Policy: Basic Documents, 1977-1980, *BR*, 527
- American International Law Cases, 1969-1978, Vols. 21-28, *BR*, 475
- Amnesty International, 177
- Amoco Cadiz* oil spill, 369
- Andean Pact, 1
- Andrés Sáenz de Santa María, M. Paz. *El Arbitraje Internacional en la Práctica Convencional Española (1794-1978)*, *BR*, 839
- Angola: Cuba and, 895, 896; US involvement in, 939, 943, 945
- Antitrust: determining US extraterritorial jurisdiction, *JD*, 735-7; dissolution of UK injunction halting suit in US court, *JD*, 141-3; 1070; jurisdiction over foreign defendants and comity, *JD*, 1069-71. *See also* International trade
- Anuario Argentino de derecho internacional, Vol. I, 1983, *BR*, 259
- Anuario de Derecho Internacional, Vol IV, 1977-1978, *BR*, 262
- Anuario Mexicano de Relaciones Internacionales, 1980, *BR*, 262
- Anzilotti, Dionisio, 1016; and PCIJ's Optional Clause, 38
- Arab states, 462; economic development agreements and immunity, 339; oil boycott and use of force, 412-3
- Arangio-Ruiz, Gaetano. *BR* of Onuf, 463
- Arbitration: compensation standards, 416-9, 421, 1041-2; enforcement, *JD*, 132-3; 776; movement of late 19th and early 20th centuries, 32-3, 47; and sovereign immunity, 334, 335, 339, 340-1, 342, 343-4, 771-4; stay of foreign proceedings by US federal courts, *JD*, 133-5. *See also* Compensation; Iran-United States Claims Tribunal; Settlement of Investment Disputes between States and Nationals of Other States, Convention on
- Argentina, 661, 898, 1065, 1066
- Arias-Schreiber, Alfonso, on third states' rights under LOS Convention, 885-6
- Arnold, Elting, & Maurice Wolf. *Doing Business with the International Development Organizations in Washington*, *BR*, 847
- Association of the Bar of the City of New York, 1959 report on act of state doctrine, 75, 80-1, 91, 719
- Atkeson, Timothy B., & Stephen D. Ramsey. Proposed Amendment of the Foreign Sovereign Immunities Act, *CD*, 770
- Australia, 357, 397; federalism and international law in, *LA*, 622
- Australian Law Reform Commission. *Foreign State Immunity*, *BR*, 1100
- Austria, 602, 605
- Aviation, implementation of international convention in Australia, 624-5. *See also* Aircraft, Convention for the Suppression of Unlawful Seizure of
- Aviation, Convention for the Suppression of Unlawful Acts Against the Safety of (1971), 1046
- Bahamas, 905, 906; and the package deal, 878
- Balekjian, W. H. *BR* of Sobrino Heredia, 835; *BR* of Swann, 836
- Balfour, Arthur, and PCIJ's Optional Clause, 38, 44
- Ballarino, Tito. *Diritto aeronautico*, *BR*, 217
- Barbados, 908, 909
- Basic Principles of Negotiations on the Further Limitation of Strategic Offensive Arms, Agreement on (1973), 53, 60
- Bassiouni, M. Cherif. *International Extradition: United States Law and Practice*, Binders I & II, *BR*, 209; The XIII International Congress on Penal Law, *CD*, 180
- Bator, Paul M. *The International Trade in Art*, *BR*, 847
- Baxter, R. R., 421; on treaties and custom, 883
- Bebr, Gerhard. *BR* of Usher, 1102
- Bedjaoui, Mohammed, and *Nicaragua* case, 1006, 1010
- Benamara, A. *See* Shihata, Ibrahim F. I.
- Bentham, Jeremy, 102, 103, 661; on incorporeal property, 689, 690
- Berger, Don. *BR* of Stein, 843

- Berlin, Isaiah, 1005
- "Bermuda 2" (US-UK Air Services Agreement, 1977), 141, 142
- Bernhardt, Rudolf (ed.). *Encyclopedia of Public International Law*. Instalments 3 & 4: Use of Force, War and Neutrality. Peace Treaties, and Instalment 5: International Organizations in General. *Universal International Organizations and Cooperation*, *BR*, 476
- , & Ulrich Beyerlin (eds.). *Deutsche Landesreferate zum Öffentlichen Recht und Völkerrecht*, *BN*, 271
- , Wilhelm Karl Geck, Günther Jaenicke & Helmut Steinberger (eds.). *Völkerrecht als Rechtsordnung—internationale Gerichtsbarkeit—Menschenrechte: Festschrift für Hermann Mosler*, *BR*, 817
- Bernstein exception, 72, 89, 90, 458–60
- Beyerlin, Ulrich, & Rudolf Bernhardt (eds.). *Deutsche Landesreferate zum Öffentlichen Recht und Völkerrecht*, *BN*, 271
- Bianchi, Paolo, & Giovanni Cordini. *Comunità Europea e protezione dell' ambiente*, *BR*, 1125
- Birk, Rolf. *BR of Morgenstern*, 1120
- Black, Vaughan. *BR of Stern*, 480; *BR of Voskuil & Wade*, 511
- Blackstone, William, 98, 100; and law of nations, 103–4
- Bleckmann, Albert. *Grundprobleme und Methoden des Völkerrechts*, *BR*, 185
- Blishchenko, I. P. *Obychnoe Oruzhie: Mezhdunarodnoe Pravo (Conventional Weapons and International Law)*, *BR*, 845
- Blocking statutes, 771
- Bob, Clifford A., & Thomas M. Franck. *The Return of Humpty-Dumpty: Foreign Relations Law after the Chadha Case*, *LA*, 912
- Book Reviews and Notes, 182, 463, 790, 1082
- Boomkamp, M. van Leeuwen. *See* Kapteyn, P. J. G.
- Bork, Robert H., concept of international law, *Ag.*, 92
- Bos, Maarten. *A Methodology of International Law*, *BR*, 793
- Bourgeois, Léon, and PCIJ's Optional Clause, 38–9, 40, 44
- Bourne, C. B. *The Canadian Yearbook of International Law*, Vol. XXI, 1983, *BR*, 523
- Bowett, Derek, 409
- Boyle, Alan E. *Marine Pollution under the Law of the Sea Convention*, *LA*, 347
- Boyle, Francis A. *BN of Elders, Eyffinger, Gellinek, Kwiatkowska & Willems*, 1141; *BR of Keal*, 1093
- Brazil, 898; and PCIJ's Optional Clause, 40–5
- Brennan, William, 685–6, 747
- Brezhnev, Leonid, and nuclear arms negotiations with US, 53–4, 60
- Briggs, Herbert W. *Nicaragua v. United States: Jurisdiction and Admissibility*, *Ed.*, 373
- Brock, William E., 728, 730
- Brooks, Douglas L. *America Looks to the Sea: Ocean Use and the National Interest*, *BR*, 491
- Brownlie, Ian. *System of the Law of Nations: State Responsibility*, Pt. 1, *BR*, 471
- (ed.). *Basic Documents in International Law* (3d ed.), *BR*, 1130
- Buckland, W., on usufruct and use in Roman law, 691–2
- Buerghenthal, Thomas, 1072: *The Advisory Practice of the Inter-American Human Rights Court*, *LA*, 1
- , Robert Norris & Dinah Shelton. *Protecting Human Rights in the Americas: Selected Problems*, *BR*, 813
- , & Robert E. Norris (eds.). *Human Rights: The Inter-American System*, Binders I–III, *BR*, 1106
- Bulgaria, 909
- Burdeau, Geneviève. *Die französischen Verstaatlichungen*, *BR*, 831
- Burger, Warren E.: and act of state doctrine, 90; on judicial review in foreign affairs, 952
- Burke, William T. *BN of O'Connell*, 529
- Burton, Steven J., on mining on Spitzbergen and deep seabed, 711–2
- Butler, W. E. *BN of Campbell*, 530; *BN of Hazard*, 861; *The Mongolian Legal System: Contemporary Legislation and Documentation*, *BN*, 530
- (ed.). *Anglo-Polish Legal Essays*, *BR*, 245

- Experiences in the Development and Management of International River and Lake Basins, *BR*, 811
- Expropriation, 778: act of state and counterclaims arising from, *JD*, 458-60; 775-6; act of state defense and FSIA, 774-6; compensation for: the case law, *Ag.*, 414; reply to, *Ag.*, 420; *Corr.* on, 1041; due process and, *JD*, 449-52; US responsibility for taking by foreign government, *JD*, 135-7; *JD*, 1060-3. *See also* Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law
- Extradition: under Genocide Convention, 117-8, 124-5; political offense exception and UK-US treaty, *CP*, 1045-7. *See also* Webster-Ashburton Treaty
- Eyffinger, A. C., J. L. M. Elders, Chr. Gellinek, B. Kwiatkowska & J. C. M. Willems. Hugo Grotius: 1583-1983, *BN*, 1141
- Fairley, H. Scott. *BR* of Foreign State Immunity, 1100
- Falk, Richard: and act of state doctrine, 82-3; *BR* of Macdonald & Johnston, 182
- Falkland Islands, sovereignty over and US claims against Argentina, 88-9
- Farer, Tom J. Political and Economic Coercion in Contemporary International Law, *Ed.*, 405
- Farley, Lawrence T. Change Processes in International Organizations, *BR*, 483
- Fassbender, Bardo. *BR* of Grewe, 803
- Faundez, Julio. *BN* of Fernández Tomás, 274; *BN* of Legislación referente a la Protección y Preservación del Pacífico Sudeste contra la contaminación proveniente de fuentes terrestres, 273
- Federalism and the International Legal Order: Recent Developments in Australia, *LA*, 622
- Fels, Gerhard. *See* Wagner, Wolfgang
- Ferencz, Benjamin B. *BR* of Delbrück, 805; *BR* of Hirsch, Majer & Meinck, 841; *BR* of Stone, 1084; *Corr.* on 1984 *Eds.* by Reisman & Schachter, 114; correction to, 721
- Fernandez, Raoul, and PCIJ's Optional Clause, 40-5
- Fernández Tomás, Antonio. El Control de las Empresas Multinacionales, *BN*, 274
- Fiji, application to intervene before ICJ, 1012-3
- Fishing, fisheries. *See* Law of the sea
- Fitzmaurice, Gerald, 999, 1030
- Fitzmaurice, Victor E. *BR* of Daoudi & Dajani, 227
- Fliess, Peter J. *BR* of Gong, 474
- Flint, David, & James Crawford (eds.). Australian International Law News, *BR*, 855
- Fluharty, David, Edward Miles, Stephen Gibbs, Christine Dawson & David Teeter. The Management of Marine Regions: The North Pacific, *BR*, 486
- , Edward Miles, John Sherman, Stephen Gibbs, Shoichi Tanaka & Masao Oda. Atlas of Marine Use in the North Pacific Region, *BR*, 486
- Folz, Hans-Ernst. *BR* of von Schönfeld, 796
- Force, use of: political and economic, *Ed.*, 405; and self-determination, *Corr.* on, 114; correction to, 721. *See also* Nicaragua
- Ford, Gerald, 905, 941: and nuclear arms negotiations with USSR, 53, 60
- Foreign Relations of the United States, 1952-1954, Vol. I: General: Economic and Political Matters, *BR*, 857; Vol. II: National Security Affairs, *BR*, 1135; Vol. XV: Korea, *BR*, 1139
- Foreign State Immunity, *BR*, 1100
- IV Jornadas de Profesores de Derecho Internacional y Relaciones Internacionales, *BR*, 262
- France, 395-6, 401, 605, 607, 620, 694, 1018, 1024: courts on immunity of foreign states and their agencies, 323-4, 328-9, 333-5, 336-7, 340; and PCIJ's Optional Clause, 29, 40, 41, 42, 44
- Franck, Thomas M., 664, 680, 911: *Corr.* on *LA* by on double standard at UN, 714; Icy Day at the ICJ, *Ed.*, 379; 1002, 1004; *Corr.* on, 423
- , & Clifford A. Bob. The Return of Humpty-Dumpty: Foreign Relations Law after the Chadha Case, *LA*, 912
- Frankowska, Maria. *BR* of Michalska, 821; *BR* of Szafarz, 235; *Corr.* on Soviet members of ILC, 720
- Fraser River salmon, provisions on in 1985 US-Canada Treaty, 432, 433, 434
- Freeland, John, on violations of diplomatic immunity, 646-7

- Friedlander, Robert A. *BR* of Stohl & Lopez, 479; Terrorism: Documents of International and Local Control. Vol. IV: A World on Fire, *BR*, 842
- Friedmann, Wolfgang, 422
- From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case, *LA*, 961
- Fromageot, Henri, and PCIJ's Optional Clause, 41, 42
- Fuller, Lon, 690
- Functionalism and the Balance of Interests in the Law of the Sea: Cuba's Role, *LA*, 891
- Furmston, M. P., R. Kerridge & B. E. Sufrin (eds.). The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights, *BR*, 199
- Galindo Pohl, Reynaldo. *BR* of Jiménez Piernas, 247
- Garber, Larry, & Courtney M. O'Connor. The 1984 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *CD*, 168; *Corr. on*, 1040
- Garbuny, Siegfried. *BR* of Goldman & Lyon-Caen, 510
- Geck, Wilhelm Karl. *See* Bernhardt, Rudolf
- Gellinek, Chr., J. L. M. Elders, A. C. Eyffinger, B. Kwiatkowska & J. C. M. Willems. Hugo Grotius, 1583–1983, *BN*, 1141
- General Act for the Pacific Settlement of International Disputes (1928), 1018, 1019
- General Agreement on Tariffs and Trade (GATT), 405, 408; and Israeli-US free trade area agreement, 728–32
- Geneva Convention Between the United States of America and other Powers Relating to Prisoners of War (1929), 1067–8
- Geneva Convention on the Continental Shelf (1958), 140, 157; and *Gulf of Maine* case, 545, 553, 554, 556–7, 558, 560–1, 568, 569, 570, 574, 576, 962, 965–6, 972, 981, 982, 983, 988–9, 990
- Geneva Convention on the High Seas (1958), 879; on protection of marine environment, 347–8, 351, 354
- Geneva Convention on the Territorial Sea and the Contiguous Zone (1958), 359, 363
- Geneva Conventions for the protection of war victims, 6, 284
- Geneva Conventions on the Law of the Sea (1958): and customary law, 871, 872, 884, 887; and protection of marine environment, 347, 350, 352
- Genocide, Convention on the Prevention and Punishment of the Crime of (1948), 748; *Nicaragua* decision and US reservations to, 656–7; US Senate committee and State Department support of, *CP*, 116–29
- Georges Bank, and Canada-US maritime boundary, 539–41, 546, 548, 550–2, 556–7, 559–60, 563, 567, 572–4, 575, 577, 579, 581, 585, 591–2, 596, 963, 969, 970–1, 985
- Germany (pre-1945), 415, 417, 602, 615, 661: mining rights and ownership in treaty with Netherlands, 694–5
- Germany, Federal Republic of, 908: Court on immunity of embassy bank accounts, 144; courts on immunity of foreign state agency, 321, 322–3, 335; international law and national law in, 599, 601, 602, 620
- Gerson, Allan: *BR* of Pogany; on *Nicaragua* case, 380, 384
- Gibbs, Harry T., on implementation of treaties in Australia, 629–30, 632, 635
- Gibbs, Stephen, Edward Miles, David Fluharty, Christine Dawson & David Teeter. The Management of Marine Regions: The North Pacific, *BR*, 486
- , Edward Miles, John Sherman, David Fluharty, Shoichi Tanaka & Masao Oda. Atlas of Marine Use in the North Pacific Region, *BR*, 486
- Gidel, Gilbert, 980
- Ginsburgs, George. The Citizenship Law of the USSR, *BR*, 807
- Glennon, Michael J. *Nicaragua v. United States*: Constitutionality of U.S. Modification of ICJ Jurisdiction, *NC*, 682; recipient of Deák Prize, 720
- Glover, Rupert Granville. *BR* of Piguet, 205
- Gobbi, Hugo, report on human rights in Poland, 716–7
- Goldie, L. F. E. Title and Use (and Usufruct)—An Ancient Distinction Too Oft Forgotten, *NC*, 689



- Goldman, Berthold, & Antoine Lyon-Caen. *Droit commercial européen* (4th ed.), *BR*, 510
- Gómez-Robledo Verduzco, Alonso. *Responsabilidad Internacional por daños transfronterizos*, *BR*, 222
- Gong, Gerrit W. The Standard of 'Civilization' in International Society, *BR*, 474
- Goodwin-Gill, Guy S. *BR* of Brownlie, *System of the Law of Nations*, 471
- Góralczyk, Wojciech. *Prawo międzynarodowe publiczne w zarysie* (Public International Law in Outline), *BR*, 794
- Górbiel, Andrzej. International Organizations and Outer Space Activities, *BN*, 273
- Gordon, Carey N. *BR* of Sohn & Gustafson, 485
- Gould, Wesley L. *BR* of Lüke, Ress & Will, 1111
- Graham, Thomas R., & Seymour J. Rubin (eds.). *Managing Trade Relations in the 1980s: Issues Involved in the GATT Ministerial Meeting of 1982*, *BR*, 1089
- Graham, William C., & Jacob S. Ziegel (eds.). *New Dimensions in International Trade Law*, *BR*, 500
- Greece, 607: employment of nationals by and US discrimination laws, *JD*, 740-2; and PCIJ's Optional Clause, 40, 43
- Green, L. C. Essays on the Modern Law of War, *BR*, 1095
- Grenada, the US action in, 402, 660, 662, 664, 941
- Grewe, Wilhelm G. *Epochen der Völkerrechtsgeschichte*, *BR*, 803
- Grievies, Forest L. *BR* of Canadian Yearbook of International Law, Vol. XXI, 1983, 523
- Griffin, Joseph P. *BR* of Kerse, 834
- Gros, André, and *Gulf of Maine* case, 543, 553, 558, 566, 574-5, 576, 582, 978-9, 984
- Gross, Leo: Book Reviews and Notes, 182, 463, 790, 1082; *BR* of Rosenne, 186
- Grossman, Claudio M. *BR* of States of Emergency: Their Impact on Human Rights, 1104
- Group of 77: and Cuban policy, 897, 904, 906-7, 908, 909, 910; and deep seabed mining, 698, 699, 700, 906-7, 908
- Gruson, Michael, & Ralph Reisner (eds.). *Sovereign Lending: Managing Legal Risk*, *BR*, 826
- Grzybowski, Kazimierz. *BR* of Hacker, 516; *BR* of Uschakow, 1132
- Guatemala, 657, 906: admissibility of reservation to American Convention on Human Rights, 23-5; jurisdiction of Human Rights Court in case involving, 9-11, 17-8
- Guinea-Bissau, 896
- (The) Gulf of Maine Case: The Nature of an Equitable Result, *LA*, 539
- Gündling, Lothar. *Die 200 Seemeilen-Wirtschaftszone: Entstehung eines neuen Regimes des Meeresvölkerrechts*, *BR*, 490
- Gustafson, Kristen, & Louis B. Sohn. The Law of the Sea in a Nutshell, *BR*, 485
- 
- Haanappel, P. P. C. Pricing and Capacity Determination in International Air Transport: A Legal Analysis, *BR*, 213
- Hacker, Jens. Der Ostblock: Entstehung, Entwicklung und Struktur, 1939-1980, *BR*, 516
- Hague Codification Conference (1930), 871
- Hague Conference on Private International Law. Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *BR*, 824
- Hague Conferences of 1899 and 1907, 32-4
- Hague Convention Respecting the Laws and Customs of War on Land (1907), 1067-8
- Haiti, 905, 906: US interdiction of visaless nationals on high seas, *JD*, 744-6
- Halberstam, Malvina: *BR* of Martin, 495; Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law, *LA*, 68; *Corr.* on, 717
- Hammer, Richard M., Gilbert Simonetti, Jr., & Charles T. Crawford (eds.). *Investment Regulation Around the World*, *BR*, 223
- Hankey, Blair, & L. H. Legault. From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case, *LA*, 961
- Hannum, Hurst. *BR* of Digest of Strasbourg Case-Law relating to the European Convention on Human Rights, 2 vols., 1108

- Hannum, Hurst, & Richard B. Lillich. Linkages between International Human Rights and U.S. Constitutional Law, *CD*, 158
- Harding, Warren, and League of Nations, 46-7
- Harlan, John M., 718, 719
- Harlow, Bruce. *Corr.* on *LA* by Caminos & Molitor, 1037
- Hartman, Joan, 1072
- Hauser, Rita E. *BR* of Lillich, 812
- Hawbaker, Thomas A. *See* Weston, Burns H.
- Hazard, John N. *BR* of Blishchenko, 845; *BR* of Butler, The USSR, Eastern Europe and the Law of the Sea, and of Ginsburgs, 807; *BR* of Essays on International & Comparative Law: In Honour of Judge Erades, 468; *BR* of Horn & Schmitthoff, 229; *BR* of Lazarev, 1087; Recollections of a Pioneering Sovietologist, *BN*, 861
- Helsinki Accords (1975), 1071: private right of action under, 1057-8
- Henkin, Louis, 84, 100, 665: and act of state doctrine, 69-70, 72, 85, 86-7; *Corr.* on, 717; exchange with US officials on LOS treaty, *CD*, 151
- Herndl, Kurt, on lawmaking by UN Sub-Commission on Minorities, 669-70
- Herzog, Peter E. (ed.). Harmonization of Laws in the European Communities: Products Liability, Conflict of Laws, and Corporation Law, *BN*, 862
- Hevener, Natalie Kaufman. *BR* of South African Yearbook of International Law, Vol. 7, 1981, & Vol. 8, 1982, 856
- Hickenlooper Amendment, 69-72, 75, 80, 90, 957-8
- Higgins, Rosalyn, 1072: The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience, *Ed.*, 641
- Hight, Keith. Litigation Implications of the U.S. Withdrawal from the *Nicaragua* Case, *NC*, 992
- High Seas. *See* Law of the sea
- Hirsch, Martin, Diemut Majer & Jürgen Meinck (eds.). Recht, Verwaltung und Justiz im Nationalsozialismus: Ausgewählte Schriften, Gesetze und Gerichtentscheidungen von 1933 bis 1945, *BR*, 841
- Holdsworth, W., 693
- Holy See. *See* Lateran Pacts
- Honduras: claims against US military for deprivation of property in, 137; *JD*, 449-52; 956-7; law of and US extraterritorial reach, 735-6; and *Nicaragua* case before ICJ, 375, 379, 445-6, 654, 657
- Hooke, A. W. (ed.). The Fund and China in the International Monetary System, *BN*, 863
- Hoover, Herbert, and the legislative veto, 917, 918-9
- Horn, Norbert, & Clive M. Schmitthoff (eds.). The Transnational Law of International Commercial Transactions, *BR*, 229
- Hostages, International Convention Against the Taking of (1979), 117, 1046
- Huber, Max, 417-8: and PCIJ's Optional Clause, 42
- Hull rule on compensation, 414-7, 420-2, 1041-2
- Human rights: *Corr.* on double standard at UN, 714; Genocide Convention supported by US Senate committee and State Department, *CP*, 116-29; implementation of international conventions in Australia, 625, 626-33, 635, 636, 637, 638-9; and Italian Constitution, 605-6, 611, 614; lawmaking, reform of in UN, *Ed.*, 664; linkages with US constitutional law, *CD*, 158; meaning and reach of Racial Discrimination Convention, *LA*, 283; minimum standards of norms in state of emergency, *CD*, 1072; right of individuals to damages for torture under international law, *Ag.*, 92; treaties and ICJ jurisdiction, 656-7; and use of force, 402-3, 404, 407, 413, 659-62, 664; violations and act of state defense, 86-7. *See also* Inter-American Court of Human Rights; (The) 1982 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities
- Humphrey, John P. Human Rights and the United Nations: A Great Adventure, *BR*, 195
- Hungary, 1018
- Hurst, Cecil, and establishment of PCIJ, 35, 38, 49-50
- Hurwitz, Bruce. *BR* of Wadegaonkar, 1116
- Hutchinson, Diane Wood. *BR* of Marke & Samie, 503

- Icy Day at the ICJ, *Ed.*, 379; *Corr.* on, 423
- Iklé, Fred C., exchange with experts on US LOS policy, *CD*, 151
- India, 124: ratification of PCIJ Statute, 46, 49
- Indonesia, UN Sub-Commission on East Timor, 170
- INF. *See* Talks on the Limitation and Reduction of Intermediate-Range Nuclear Forces
- Inglés, José D., on Racial Discrimination Convention, 297, 298, 303
- In Memoriam: Professor Ted L. Stein (1952-1985), *NC*, 1036
- Inter-American Commission on Human Rights, 2, 1066: and advisory practice of Court, 1, 3, 4, 5, 7-8, 9-11, 15, 17, 20-1, 24
- Inter-American Court of Human Rights, 1066: advisory practice of, *LA*, 1
- Intergovernmental organizations, of OAS and Human Rights Court's jurisdiction, 4, 5
- International Air Transport Association (IATA), 141-2
- International Association of Penal Law, 13th congress of, *CD*, 180
- International Bank for Reconstruction and Development (World Bank), 335
- International Chamber of Commerce, 334
- International Convention for the Regulation of Whaling (1946), US policy on Japan's observation of quotas under, *CP*, 434-8
- International Commission of Jurists. States of Emergency: Their Impact on Human Rights, *BR*, 1104
- International Convention on the Elimination of All Forms of Racial Discrimination (1966), 656, 665, 680: Australian aboriginal property rights and, 626-32, 635, 636, 637, 638-9; meaning and reach of, *LA*, 283
- International Court of Justice, 285, 315, 618: and Genocide Convention, 117, 122, 124, 125-6; and jurisdiction and admissibility of *Nicaragua* case, *Ed.*, 373; 381-4, 423-30, 440-1; *JD*, 442-6; *Ed.*, 652; 658, 992-3, 1000, 1001, 1003, 1007, 1012, 1025, 1028; on treaties and custom, 879-82; use of Chamber procedure, 441, 543, 580, 581-3; US withdrawal from *Nicaragua* case, *Ed.*, 379; *Corr.*, 423; *CP*, 438-41; 657; *NC*, 592. *See also* Law of the sea: Canada-US maritime boundary delimitation
- International Court of Justice, Statute of: and *Gulf of Maine* case, 541, 578, 580, 582, 583; modifying adherence to the optional clause, 376-8, 382-3; *Ed.*, 385; 427-8, 441, 444, 446, 652, 653-4, 657; *NC*, 682; and nonappearance, 993-5; optional clause and *Nicaragua* case, 373-4, 380, 382, 424-8, 439-41, 442-4, 446, 652-3, 1002, 1014, 1024-7; and Salvadoran intervention during preliminary proceedings of *Nicaragua* case, *NC*, 1005
- International Covenant on Civil and Political Rights, 173, 675, 1072: Australian reservations to, 633; and Racial Discrimination Convention, 286, 292-3, 294, 296, 299, 301-2, 306; and UN lawmaking, 665, 676, 680
- International Labour Organisation (ILO), 5, 317, 624: lawmaking by, 671, 674-5, 677, 679
- International law: basis for US position on *Nicaragua*, *Ed.*, 657; and Community law in Italy, *LA*, 598; and federalism in Australia, *LA*, 622; functionalism and, 891, 911; progressive development and the package deal, *LA*, 871; *Corr.* on, 1037
- International Law Association, 111, 168: Minimum Standards of Human Rights Norms in a State of Emergency, *CD*, 1072
- International Law Commission, 316, 367, 646: *Corr.* on Soviet members, 720; draft articles on state responsibility, 85-6; lawmaking by, 672, 673-4, 676, 678, 679, 680; 36th session of, *CD*, 755; on treaties and third states, 879
- International lawyers, and US-USSR nuclear arms negotiations, 52, 58, 61, 65-7
- International Legal Materials (Contents), 280, 536, 868, 1148
- International Liability for Damage Caused by Space Objects, Convention on (1972), 163-4
- International liability for lawful acts, ILC progress on defining, 755, 766-7
- International Maritime Organization (IMO), and regulating marine pollution, 356-7, 361-2, 371
- International Monetary Fund, 406, 733
- International organizations: under Italian Constitution, 599, 603, 610, 621; standards for regulating marine environment, 353-4, 355-62, 370, 372
- International trade: and economic coercion, 406, 412-3; economic development and sovereign immunity, *LA*, 319; Israeli-US free trade area agreement, *CP*, 728-32; judicial review of US

- export licensing, *JD*, 460-2; proposed amendment of FSIA, *CD*, 770; statute of limitations and enforcement of antiboycott regulations, *JD*, 1055-6; US rule on countervailing duties on imports, *JD*, 137-9. *See also* Antitrust
- International Whaling Commission, 435-8
- Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The "Salvadoran Incident," *NC*, 1005
- Iran, 995, 1019, 1020: European sovereign immunity cases, 321-3, 333-5; forum selection in contract with, *JD*, 751-4; hostages crisis, 381, 384, 397, 404, 430, 941. *See also* Iran-United States Claims Tribunal
- Iran-United States Claims Tribunal, 462: on compensation standard, 419; on counterclaims and nationality of claimants, *JD*, 146-8; on forum selection clauses, 754; on monetary consequences of frustration of contract, *JD*, 148-9
- Ireland, Republic of, governmental agencies and US immunity rules, 330-3
- Irish Republican Army, Provisional wing, 1047
- Israel, 92-3, 462, 664: Arab oil boycott and self-determination of occupied territories, 412-3; free trade area agreement with US, *CP*, 728-32
- Italy, 1018: Community law and international law in, *LA*, 598; court on immunity of foreign public entity, 337-8; and PCIJ's Optional Clause, 29, 37-8, 42
- Iwasaki, Kazuo, & Michael Pryles. Dispute Resolution in Australia-Japan Transactions, *BR*, 838
- Jackson, John H., Jean-Victor Louis & Mitsuo Matsushita. Implementing the Tokyo Round: National Constitutions and International Economic Rules, *BR*, 509
- Jackson, Robert H., 953: on presidential powers, 687
- Jacobson, Harold K. Networks of Interdependence: International Organizations and the Global Political System (2d ed.), *BR*, 482
- Jænicke, Günther. *See* Bernhardt, Rudolf
- Jain, Subhash C. Nationalization of Foreign Property: A Study in North-South Dialogue, *BR*, 830
- Jamaica, 905: immunity of governmental agency, 326
- Janković, Branimir M. Public International Law, *BR*, 183
- Japan, 62, 741: and PCIJ's Optional Clause, 29, 31, 37-8, 40; and UN Sub-Commission on Minorities, 171; *Corr.* on, 1040; US policy on observation of whaling quotas, *CP*, 434-8
- Jenisch, Uwe. *BR* of Gündling, 490
- Jennings, Robert, 889-90: on customary law and LOS Convention, 885; on domestic jurisdiction in international law cases, 79-80; and *Nicaragua* case, 373, 383, 425, 427, 443-4, 1006, 1027
- Jessup, Philip, on national courts and sovereign immunity claims, 76-7, 80, 90
- Jhabvala, Farrokh. *BR* of Agarwal, 196
- Jiménez de Aréchaga, Eduardo, on ICJ Chamber procedure, 581, 582
- Jiménez Piernas, Carlos Bartolomé. El Proceso de formación del derecho internacional de los archipiélagos, 2 vols., *BR*, 247
- Johnston, Douglas M., & R. St. J. Macdonald (eds.). The Structure and Process of International Law: Essays in Legal Philosophy, *BR*, 182
- Jolowicz, H., on title and usufruct in Roman law, 692
- Jordan, 413: House report on arms assistance to, 934
- Jordan, Robert S. (ed.). Dag Hammarskjöld Revisited: The UN Secretary-General as a Force in World Politics, *BR*, 197
- Jeyner, Christopher C. *BR* of Janković, 183
- Judge Bork's Concept of the Law of Nations Is Seriously Mistaken, *Ag.*, 92
- Judicial assistance: Swiss-US measures to facilitate, *CP*, 722-8; US rules on taking evidence abroad in criminal cases, *CP*, 129-31
- Judicial Decisions, 132, 442, 733, 1054
- Judicial review: and Community law in Italy, 600, 603-4, 609, 611-2, 613-6, 617, 619-21; of foreign affairs questions, 951-9, 960. *See also* Act of state doctrine
- Jurisdiction: advisory, practice of Inter-American Court under, *LA*, 1; antitrust, over foreign defendants and comity, *JD*, 1069-71; compulsory, Britain's role in shaping PCIJ's, *LA*, 28;

domestic, in international law cases, 78-83; extraterritorial, rule of reason in determining, *JD*, 735-7; of US courts over acts of aliens abroad, *Ag.*, 92; of US courts over US nationals under Genocide Convention, 123-4. *See also* International Court of Justice; Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings; Iran-United States Claims Tribunal; Sovereign immunity

Kaiser, Karl. *See* Wagner, Wolfgang

Kapteyn, P. J. G., P. H. Kooijmans, R. H. Lauwaars, H. G. Schermers & M. van Leeuwen Boomkamp (eds.). *International Organization and Integration: Annotated Basic Documents and Descriptive Directory of International Organizations and Arrangements*, Vol. II.B-II.J (2d rev. ed.), *BR*, 520

Karl, Donald E. *BR* of Theutenberg, 1127

Karns, Margaret Padelford. *BR* of Farley, 483

Keal, Paul. *Unspoken Rules and Superpower Dominance*, *BR*, 1093

Kennedy, John F., 921

Kenney, William Sumner. *BR* of Bassiouni, 209

Kent, Charles L. *BR* of Haanappel, 213

Kerridge, R., M. P. Furmston & B. E. Sufrin (eds.). *The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights*, *BR*, 199

Kerse, C. S. *EEC Antitrust Procedure. Supplement 1984*, *BR*, 834

Kim, Samuel S. *The Quest for a Just World Order*, *BR*, 802

Kirgis, Frederic L., Jr. *BR* of McWhinney, 1088; *Nicaragua v. United States as a Precedent*, *Ed.*, 652

Kirkpatrick, Jeane, 379-80

Klimenko, B. M., V. F. Petrovskij & Ju. M. Rybakov (eds.). *Slovar Mezhdunarodnogo Prava* (Dictionary of International Law), *BR*, 849

Kloepfer, Michael, & Christian Kohler. *Kernkraftwerk und Staatsgrenze: Völkerrechtliche, verfassungsrechtliche, europarechtliche, kollisions- und haftungsrechtliche Fragen grenznaher Kernkraftwerke*, *BR*, 496

Koh, Tommy, on the package deal, 886, 887-8, 1038

Kohler, Christian, & Michael Kloepfer. *Kernkraftwerk und Staatsgrenze: Völkerrechtliche, verfassungsrechtliche, europarechtliche, kollisions- und haftungsrechtliche Fragen grenznaher Kernkraftwerke*, *BR*, 496

Kolosov, Yuri, & Gennady Zhukov. *International Space Law*, *BR*, 218

Kooijmans, P. H. *See* Kapteyn, P. J. G.

Kronmiller, Theodore G. *The Lawfulness of Deep Seabed Mining*, Vols. I & II, *BR*, 809

———, & G. Wayne Smith. *The Lawfulness of Deep Seabed Mining*, Vol. III, *BR*, 809

Kulski, W. W. *BR* of Butler, *Anglo-Polish Legal Essays*, 245

Kvitsinskiy, Yuli, and US-USSR nuclear arms negotiations, 59

Kwiatkowska, B., J. L. M. Elders, A. C. Eyffinger, Chr. Gellinek & J. C. M. Willems. *Hugo Grotius, 1583-1983*, *BN*, 1141

Labour Party (UK), and PCIJ's Optional Clause, 51

Lacey, John R. *BN* of Herzog, 862; *BR* of Toepke, 837

Lammers, J. G. *Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law*, *BR*, 1123

La Pergola, Antonio, & Patrick Del Duca. *Community Law, International Law and the Italian Constitution*, *LA*, 598

Lateran Pacts, Concordat and Italian law, 607-8, 621

Latin American states, 1045; and Cuba's LOS policy, 893-4, 897-8, 900, 903; declarations on LOS policy, 898, 900, 903; economic development agreements and immunity, 339; and PCIJ's Optional Clause, 40, 43

Lauterpacht, Hersch, 393, 421-2; and declarations under ICJ optional clause, 1024-5

Lauwaars, R. H. *See* Kapteyn, P. J. G.

## Law of the sea

- Canada-US maritime boundary delimitation, 441: From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case, *LA*, 961; The Gulf of Maine Case: The Nature of an Equitable Result, *LA*, 539; Some Perspectives on Adjudicating before the World Court: The Gulf of Maine Case, *LA*, 578
- Continental shelf, 358, 397: Cuban policy, 904-5, 906; delimitation and *Gulf of Maine* case, 539, 541, 543, 545-6, 549, 552, 553, 554-5, 556-7, 559, 561, 563, 566, 567-9, 571, 574-5, 578, 579, 583-5, 586, 589, 590, 961-2, 965, 966-9, 973, 974-85, 988-91; rights to beyond territorial sea in federal system, *JD*, 139-41
- Exclusive economic zone: Cuban policy, 901, 903-6, 909; the "gray area" problem, 987-8; and *Gulf of Maine* case, 541, 545-6, 548, 549, 550, 552, 553, 555-6, 561, 566, 584, 962, 966, 971, 973, 976-84, 988-90; and the package deal, 874-6, 885, 888; regulation of pollution in, 355, 358, 360-2, 364-5, 372
- Fisheries: and Canada-US maritime boundary, 539-41, 543, 545-6, 550-6, 559-60, 562-3, 566, 567-8, 570, 573-4, 576-7, 578-81, 583-5, 589-90, 592, 596, 963, 970-2, 973, 976, 988, 989-90; Cuban policy, 893, 894-5, 901, 903, 905-6, 908-9; rights sans ownership, 694; US-Canada Treaty on Pacific Salmon, *CP*, 432-4; US policy on Japanese whaling, *CP*, 434-8
- High seas, 553: basis for seabed mining claims in, *NC*, 689; Cuban policy, 901-2, 910; measures against pollution on, 358, 365, 368-9, 370, 371; US interdiction of visaless aliens on, *JD*, 744-6
- Marine environment, 396-7, 903: Cuban policy, 908-9; and *Gulf of Maine* case, 550-1, 577, 589, 595-6, 963-4, 969-70, 975, 976, 977, 985, 990; pollution under the 1982 Convention, *LA*, 347; US policy on Japan's observation of whaling quotas, *CP*, 434-8
- Marine scientific research, Cuban policy, 909-10
- Territorial sea: Cuban policy, 898, 900-2, 905, 910; jurisdiction over pollution in and beyond, 348-9, 357-8, 359-60, 362, 363, 364-5, 369, 372; and the package deal, 874-5, 885, 889
- UN Convention, 688: exchange between experts and US officials on nonseabed mining under, *CD*, 151; and *Gulf of Maine* case, 550, 553, 555, 568, 575, 576, 961-2, 966, 977, 978, 979, 980-4; marine pollution under, *LA*, 347; and Moon Treaty, 164; the package deal and customary law, *LA*, 871; *Corr.* on, 1037; seabed mining under, 700, 713, 897, 906-8
- Law of war, naval, and Britain's attitude to PCIJ's Optional Clause, 36-7, 39, 45-6
- Lawrence, Robert C., III. International Tax and Estate Planning, *BR*, 518
- Lazarev, M. I. (ed.). *Sovremennoe mezhdunarodnoe morskoe pravo* (Contemporary International Maritime Law), *BR*, 1087
- League of Nations, 999, 1027: Assembly, and PCIJ's Optional Clause, 29-30, 40-4, 45; Council, and PCIJ's Optional Clause, 29-30, 36, 38, 39-40, 41, 43, 44, 45; Covenant and PCIJ, 28, 29-31, 33-4, 39, 40, 41. *See also* Permanent Court of International Justice
- Leebron, David W., & Marsha A. Cohan. *BR of Nee, Chu & Moser*, 505
- Legal issues of European integration, 1983/1, *BR*, 484
- Legault, L. H., & Blair Hankey. From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case, *LA*, 961
- Legislación referente a la Protección y Preservación del Pacífico Sudeste contra la contaminación proveniente de fuentes terrestres, *BN*, 273
- Leich, Marian Nash. Contemporary Practice of the United States Relating to International Law, 116, 431, 722, 1044. *See also* Nash, Marian Lloyd
- Leigh, Monroe, 382: Judicial Decisions, 132, 442, 733, 1054
- Leng, Shao-chuan. *BR of Chiu*, 269
- Leung, Frankie Fook-lun. *BN of Chen*, 1142; *BR of Kim*, 802; *BR of Yung*, 504
- Levie, Howard S. The Status of Gibraltar, *BR*, 234
- Liberia, 998, 999
- Libya, 418: diplomatic immunities and London People's Bureau, 642, 643-5, 648, 757; enforcement of arbitral award against in various countries, 340-1
- Liebesny, Herbert J. *BR of Shamgar*, 207

- Lillich, Richard B. The Human Rights of Aliens in Contemporary International Law, *BR*, 812;  
The Paris Minimum Standards of Human Rights Norms in a State of Emergency, *CD*, 1072  
———, & Hurst Hannum. Linkages between International Human Rights and U.S. Constitutional Law, *CD*, 158
- Limitation of Strategic Offensive Arms, Interim Agreement on (1972), 53
- Limitation of Strategic Offensive Arms, Treaty on (SALT II, 1979), 54, 58
- Limited Test Ban Treaty (1963), 52, 54
- Linkages between International Human Rights and U.S. Constitutional Law, *CD*, 158
- Litigation Implications of the U.S. Withdrawal from the *Nicaragua* Case, *NC*, 992
- Liu Fengming. Xiandai guoji fa gangyao (Essentials of modern international law), *BR*, 466
- Lloyd, Lorna. "A Springboard for the Future": A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice, *LA*, 28
- Lockwood, Bert B., Jr., on UN Charter and US courts, 159
- Loder, Bernard C. J., and PCIJ's Optional Clause, 34, 43
- Loomis, Mark M. *BR* of Treves & of Treves (ed.), 249
- Lopez, George A., & Michael Stohl (eds.). The State as Terrorist: The Dynamics of Governmental Violence and Repression, *BR*, 479
- Louis, Jean-Victor, John H. Jackson & Mitsuo Matsushita. Implementing the Tokyo Round: National Constitutions and International Economic Rules, *BR*, 509
- Lowe, A. V., & R. R. Churchill. The Law of the Sea, *BR*, 488
- Lowenfeld, Andreas, and act of state doctrine, 70; *Corr.* on, 717
- Lozano Bartolozzi, Pedro. *See* Corriente Córdoba, José A.
- Lubic, Robert Bennett. *BR* of Moser, 230
- Lücke, Gerhard, Georg Röss & Michael R. Will (eds.). Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Léontin-Jean Constantinesco, *BR*, 1111
- Lyon-Caen, Antoine, & Berthold Goldman. Droit commercial européen (4th ed.), *BR*, 510
- McCaffrey, Stephen C. The Thirty-sixth Session of the International Law Commission, *CD*, 755
- Macalister-Smith, Peter. International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization, *BR*, 1113
- MacDermot, Niall. *Corr.* on *CD* on UN Sub-Commission on Minorities, 1040
- MacDonald, Charles G. *BR* of Dawisha & Dawisha, 1099
- Macdonald, R. St. J., & Douglas M. Johnston (eds.). The Structure and Process of International Law: Essays in Legal Philosophy, *BR*, 182
- McDougal, Myres, on *Sabbatino* and act of state, 75, 80
- McMichael, R. Daniel, & John D. Paulus (eds.). Western Hemisphere Stability—The Latin American Connection, *BR*, 244
- McNeill, John H. U.S.-USSR Nuclear Arms Negotiations: The Process and the Lawyer, *LA*, 52
- McWhinney, Edward. United Nations Law Making: Cultural and Ideological Relativism and International Law Making for an Era of Transition, *BR*, 1088
- Maggs, Peter B. *BR* of Butler, Basic Documents on the Soviet Legal System, 521
- Maitland, F., on incorporeal property rights in common law, 693
- Majer, Diemut, Martin Hirsch & Jürgen Meinck (eds.). Recht, Verwaltung und Justiz im Nationalsozialismus: Ausgewählte Schriften, Gesetze und Gerichtsentscheidungen von 1933 bis 1945, *BR*, 841
- Malone, James L.: on compromise at UNCLOS III, 876; letter to experts on US LOS policy, 155-6
- Mann, F. A., 86
- Marine Pollution by Dumping of Wastes and Other Matter, International Convention on the Prevention of (1972), and 1982 LOS Convention, 348, 354, 356, 363
- Marine Pollution under the Law of the Sea Convention, *LA*, 347
- Maris, Gary L. International Law: An Introduction, *BR*, 475
- Marke, Julius J., & Najeeb Samie (comps./eds.). Anti-Trust and Restrictive Business Practices: International, Regional & National Regulation, *BR*, 503

- Marsteller, Thomas F., Jr. *BN* of Wagner-Silva Tarouca, 272
- Martin, J. Paul (ed.). *Human Rights: A Topical Bibliography*, *BR*, 495
- Martínez Cobo, José R., study on discrimination against indigenous populations, 174
- Marvin, Charles A. *BR* of Ziegel & Graham, 500
- Mason, Anthony F., on implementation of treaties in Australia, 633
- Mathias, Charles McC., proposals to amend FSIA, *CD*, 770
- Matsushita, Mitsuo, Jean-Victor Louis & John H. Jackson. Implementing the Tokyo Round: National Constitutions and International Economic Rules, *BR*, 509
- Mauritania, and UN Sub-Commission on Minorities, 173, 179
- Mayaguez* incident, 941, 945
- Mayer, Ann Elizabeth. *BR* of El Sheikh, 860
- (The) Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination, *LA*, 283
- Meinck, Jürgen, Martin Hirsch & Diemut Majer (eds.). *Recht, Verwaltung und Justiz im Nationalsozialismus: Ausgewählte Schriften, Gesetze und Gerichtsentscheidungen von 1933 bis 1945*, *BR*, 841
- Mendelson, M. H. *BR* of International Organization and Integration, Vol. II.B-II.J; *BR* of Sztucki, 190; Compensation for Expropriation: The Case Law, *Ag.*, 414; response by Schachter, *Ag.*, 420; *Corr.* in reply, 1041
- Meron, Theodor. The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination, *LA*, 283; Reform of Lawmaking in the United Nations: The Human Rights Instance, *Ed.*, 664
- Metzger, John M. *BR* of Legal issues of European integration, 1983/1, 484
- Mexico, 897, 898, 905: immunity of governmental agency re oil spill, 326-8; US conspiracy to bribe agency officials of, *JD*, 452-4
- Michalska, Anna. *Prawa Człowieka w Systemie Norm Międzynarodowych*, *BR*, 821
- Migrant Workers and Their Families, Convention on the Protection of the Rights of All, 671
- Miles, Edward, Stephen Gibbs, David Fluharty, Christine Dawson & David Teeter. The Management of Marine Regions: The North Pacific, *BR*, 486
- , John Sherman, David Fluharty, Stephen Gibbs, Shoichi Tanaka & Masao Oda. *Atlas of Marine Use in the North Pacific Region*, *BR*, 486
- Millán, Victor, & Michael A. Morris (eds.). *Controlling Latin American Conflicts: Ten Approaches*, *BR*, 239
- Miller, Arthur S. *BR* of Weston, 203
- Milsom, S., 693
- Mitchell, William D., on legislative veto, 919, 920
- Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court, *Ed.*, 385
- Molitor, Michael R., & Hugo Caminos. Progressive Development of International Law and the Package Deal, *LA*, 871; *Corr.* on, 1037
- Moon Treaty (1979): resource exploitation under, *CD*, 163; resource rights and ownership under, 701, 702
- (The) Moon Treaty Enters into Force, *CD*, 163
- Moore, John Norton, 588
- Morgenstern, Felice. International Conflicts of Labour Law: A survey of the law applicable to the international employment relation, *BR*, 1120
- Morris, Michael A., & Victor Millán (eds.). *Controlling Latin American Conflicts: Ten Approaches*, *BR*, 239
- Moser, Michael J. (ed.). Foreign Trade, Investment and the Law in the People's Republic of China, *BR*, 230
- , Owen D. Nee, Jr., & Franklin D. Chu (eds.). *Commercial, Business and Trade Laws: The People's Republic of China*, 2 binders, *BR*, 505
- Mosler, Hermann, 373, 1006: festschrift for, *BR*, 817; and *Gulf of Maine* case, 543, 559, 566, 582
- Moynihan, Daniel Patrick, on US and ICJ, 405
- Mozambique, 896



- Murphy, Joseph P. *BR* of Ouazzani Chahdi, 237; *BR* of Tezcán, 514
- Murphy, Lionel K., on implementation of treaties in Australia, 628
- Nagendra Singh, and *Nicaragua* case, 373, 1006, 1010, 1011
- Nagler, Damir. *BR* of Wagner, Dönhoff, Fels, Kaiser & Noack, 524
- Nascimento e Silva, G. E. do. *BR* of Gómez-Robledo Verduzco, 222; *BR* of Lammers, 1123
- Nash, Marian Lloyd. Digest of United States Practice in International Law, 1979, *BR*, 265. *See also* Leich, Marian Nash
- Nationality: as basis for hiring preference in FCN treaties, 740-2; of claimants before Iran-US Tribunal, 146-7; specific intent in loss of, *JD*, 1063-5. *See also* Aliens
- National liberation movements, and Cuba, 896
- Natural law, and private actions, 103, 107-12
- Natural resources, 412: and Cuba's LOS policy, 897, 898, 900, 903, 906-8; exploitation of and sovereign immunity, 321-8, 345; ILC on international watercourses as shared, 767, 768; permits and *Gulf of Maine* case, 556-7, 558, 560, 563, 565, 567, 569, 576, 590, 963, 970, 972-3, 975, 976, 977, 985; and property rights, 694-3, 700-14. *See also* Common heritage of mankind; Law of the sea: Fisheries
- Nee, Owen D., Jr., Franklin D. Chu & Michael J. Moser (eds.). Commercial, Business and Trade Laws: The People's Republic of China, 2 binders, *BR*, 505
- Negotiations: Cuba's role at UNCLOS III, *LA*, 891; US-USSR on nuclear arms, *LA*, 52
- Nelson, Richard W. *BR* of Jacobson, 482; *BR* of Maris, 475
- Netherlands, 779: courts on immunity of foreign state agency, 321-2; mining rights and ownership in treaty with Germany, 694-5; and PCIJ's Optional Clause, 34, 37, 40, 43
- Netherlands Yearbook of International Law, Vol. XIV, 1983, *BR*, 526
- Neuhold, Hanspeter. *BR* of Bleckmann, 185
- New International Economic Order, 696, 897
- New Zealand, and Racial Discrimination Convention, 309
- Nicaragua, 895, 896, 935, 939, 940, 956: case against the US, 595, 597: admissibility of Application, 374-6, 439, 446, 1026, 1028; constitutionality of US modification re ICJ optional clause, *NC*, 682; ICJ decision on El Salvador's application to intervene, *NC*, 1005; ICJ decision on jurisdiction and admissibility, *Ed.*, 373; 382-4, 423-30, 439, 440-1; *JD*, 442-6; *Ed.*, 652; 658, 992-3, 1000, 1003, 1007, 1012; legal rationale for US actions, *Ed.*, 657; US withdrawal from, *Ed.*, 379; *CP*, 438-41; 446; *NC*, 992
- Nicaragua* and International Law: The "Academic" and the "Real," *Ed.*, 657
- Nicaragua v. United States* as a Precedent, *Ed.*, 652
- Nicaragua v. United States*: Constitutionality of U.S. Modification of ICJ Jurisdiction, *NC*, 682
- Nicaragua v. United States*: Jurisdiction and Admissibility, *Ed.*, 373
- Nielsen, Fred K., on Spitzbergen mining rights, 709-10
- Nigeria, 779, 782-3: abduction in UK of former Transport Minister, 757
- (The) 1984 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *CD*, 168; *Corr. on*, 1040
- Nitze, Paul, and US-USSR nuclear arms negotiations, 59
- Nixon, Richard M., 122, 940, 947: and the legislative veto, 921; and nuclear arms negotiations with USSR, 53
- Noack, Paul. *See* Wagner, Wolfgang
- Nonaligned countries, and Cuba, 893-4, 897, 911
- Nongovernmental organizations: and proceedings before Inter-American Court, 15-7; and UN Sub-Commission on Minorities, 170, 171, 173, 177-8
- Norris, Robert, Thomas Buergenthal & Dinah Shelton. Protecting Human Rights in the Americas: Selected Problems, *BR*, 813
- , & Thomas Buergenthal (eds.). Human Rights: The Inter-American System, Binders I-III, *BR*, 1106
- North Atlantic Fisheries Task Force, 540
- North Atlantic Treaty Organization (NATO), 406, 748: US consultation on nuclear arms negotiations with USSR, 62-3
- North-South Dialogue: A New International Economic Order, *BR*, 501

- Norway, 416, 1024: courts and Racial Discrimination Convention, 304; and PCIJ's Optional Clause, 40, 41, 43. *See also* Spitzbergen
- Nuclear War, Agreement on Measures to Reduce the Risk of (1971), 53
- Nuclear weapons, US-USSR negotiations on, *LA*, 52
- Nuclear Weapons, Treaty on the Non-Proliferation of (1968), 53
- O'Connell, D. P., edited by I. A. Shearer. *The International Law of the Sea*, Vol. II, *BN*, 529
- O'Connor, Courtney M., & Larry Garber. The 1984 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *CD*, 168; *Corr. on*, 1040
- Oda, Masao, Edward Miles, John Sherman, David Fluharty, Stephen Gibbs & Shoichi Tanaka. *Atlas of Marine Use in the North Pacific Region*, *BR*, 486
- Oda, Shigeru: on maritime delimitation and resources, 985-6; and *Nicaragua* case, 373, 382, 428, 443-4, 1006, 1008, 1010, 1014-5, 1032, 1033, 1035, 1036
- Oil Pollution Casualties, International Convention relating to Intervention on the High Seas in Cases of (1969), 348, 349, 368-9
- Oil Pollution Damage, International Convention on Civil Liability for (1969), 348, 349, 368
- Oliver, Covey T., 959
- Onuf, Nicholas Greenwood (ed.). *Law-Making in the Global Community*, *BR*, 463
- Oppenheim, Lassa, 112: on subjects of international law, 97, 101-2, 104
- Oppenheim/Lauterpacht, 102. *See also* Oppenheim, Lassa
- Organization of African Unity, declaration on LOS policy, 903
- Organization of American States (OAS), 897, 1032, 1033: Charter and Human Rights Court, 1-2, 3-4, 7-8, 9-10; Charter on use of force, 406, 411. *See also* Inter-American Court of Human Rights
- Organization of Petroleum Exporting Countries (OPEC), 324-6, 413
- Ouazzani Chahdi, Hassan. *La Pratique marocaine du droit des traités (Essai sur le droit conventionnel marocain)*, *BR*, 237
- Outer Space Treaty (1967): and Moon Treaty, 163, 164, 165-6; resource rights and ownership under, 701-2
- Özgür, Özdemir A. *Apartheid: The United Nations and Peaceful Change in South Africa*, *BR*, 193
- Pacific Salmon Commission, establishment of, *CP*, 432-4
- Palestine Liberation Organization (PLO), 92-4, 96, 105, 946: and Cuba, 897
- Panel on the Law of Ocean Uses, exchange with US officials on LOS policy, *CD*, 151
- (The) Paris Minimum Standards of Human Rights Norms in a State of Emergency, *CD*, 1072
- Parra, Antonio R. *See* Shihata, Ibrahim F. I.
- Paulus, John D., & R. Daniel McMichael (eds.). *Western Hemisphere Stability—The Latin American Connection*, *BR*, 244
- Pavesi, Ida. *BR* of Bianchi & Cordini, 1125
- Peace and Security of Mankind, Draft Code of Offences against, ILC 36th session on, 755-7
- Pechota, Vratislav. *BR* of Selected Articles from Chinese Yearbook of International Law, 851
- Pell, Claiborne, on US policy re LOS Convention, 886
- Peltier, Leonard, 171, 176
- Pérez Montero, José. *BR* of Remiro Brotons, 470; *BR* of Uribe Vargas, 493
- Permanent Court of Arbitration, 416: and PCIJ's Optional Clause, 32, 36
- Permanent Court of International Justice (PCIJ), 102, 376, 381, 394, 399, 583: Britain's role in shaping Optional Clause, *LA*, 28; on compensation for expropriation, 415-6; intervention before, 1018, 1029-30; whether Nicaragua ratified Optional Clause, 373-4, 382, 424-6, 443-4, 652-3
- Peru, 1009: and advisory jurisdiction of Inter-American Human Rights Court, 5
- Petrovskij, V. F., B. M. Klimenko & Ju. M. Rybakov (eds.). *Slovar Mezhdunarodnogo Prava (Dictionary of International Law)*, *BR*, 849
- Pfänger, Friedbert. *Die Menschenrechtspolitik der USA: Amerikanische Aussenpolitik zwischen Idealismus und Realismus, 1972-1982*, *BR*, 820
- Philippines, 699

- Phillimore, Lord, and PCIJ's Optional Clause, 32, 35
- Phillips, Leo H., Jr. *BR* of Ruddy, 475
- Piguet, Christophe. La Guerre civile en droit international. Contribution à l'étude de la responsabilité internationale de l'Etat à raison des dommages éprouvés sur son territoire par des étrangers, du fait du mouvement insurrectionnel, *BR*, 205
- Pinto, Ambassador. *See* Silva Pinto, P. Corte Real da
- Plant, G. *BR* of Churchill & Lowe, 488; *BR* of Kronmiller, 2 vols., and of Kronmiller & Smith, 809
- Plischke, Elmer. *BR* of American Foreign Policy: Basic Documents, 1977-1980, 527; *BR* of Foreign Relations of the United States, 1952-1954, Vol. I: General: Economic and Political Matters, 857; *BR* of Vol. II: National Security Affairs, 1135; *BR* of Vol. XV: Korea, 1139
- Póány, István S. The Security Council and the Arab-Israeli Conflict, *BR*, 801
- Polach, Jay G. *BR* of Kloepper & Kohler, 496
- Poland, 415: *Corr.* on UN double standard re, 714; liability for defaulted treasury notes, *JD*, 742-4
- Political and Economic Coercion in Contemporary International Law, *Ed.*, 405
- Pollock, Frederick, on moral standard and law, 317
- Pollution, immunity of Mexican agency re oil spill, 326-8. *See also* Law of the sea: Marine environment
- Pollution from Ships, International Convention for the Prevention of (1973), 157; and 1982 LOS Convention, 348, 351, 354, 355-6, 359, 361, 363, 369, 371
- Pollution of the Sea by Oil, International Convention for the Prevention of (1954), and 1982 LOS Convention, 347, 351, 354, 355-6, 359, 371
- Powell, Lewis R.: on compensation and foreign policy goals, 85; on *Sabbatino* opinion, 89-90
- Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Treaty on (Outer Space Treaty or Principles Treaty, 1967). *See* Outer Space Treaty
- Principles Treaty. *See* Outer Space Treaty
- Procedural Aspects of International Law Institute, conference on human rights and constitutional law, *CD*, 158
- Professor D'Amato's Concept of American Jurisdiction Is Seriously Mistaken, *Ag.*, 105
- Progressive Development of International Law and the Package Deal, *LA*, 871; *Corr.* on, 1037
- Property rights: and deep seabed mining, *NC*, 689; and sovereign immunity, 762, 764-6
- Proposed Amendment of the Foreign Sovereign Immunities Act, *CD*, 770
- Provisional Understanding regarding Deep Seabed Mining (1984), 695-6, 698, 701, 702, 703
- Pryles, Michael, & Kazuo Iwasaki. Dispute Resolution in Australia-Japan Transactions, *BR*, 838
- Qaddafi, Muammar, 643
- Quentin-Baxter, Robert Q., 766
- Questiaux, Nicole, 1073
- Rabaza Vázquez, José Antonio, 901, 903, 904, 905
- Ramsey, Stephen D., & Timothy B. Atkeson. Proposed Amendment of the Foreign Sovereign Immunities Act, *CD*, 770
- Rao, P. Sreenivasa. *BR* of Jain, 830
- Rashkow, Bruce C., Davis R. Robinson & David A. Colson. Some Perspectives on Adjudicating before the World Court: The Gulf of Maine Case, *LA*, 578
- Reagan, Ronald, 116, 122, 176-7, 438, 548, 580, 728-9, 747, 748, 917, 941, 946, 955, 963, 1045: administration and *Nicaragua* case, 380-1, 384, 423, 687, 588-9, 1004; exchange on administration policy on nonseabed mining, *CD*, 151; and LOS treaty rights, 876-7; and nuclear arms negotiations with USSR, 54, 64; and US Nicaraguan policy, 657-8, 660, 661, 662, 935. *See also* United States Department of State; United States President
- Recognition and Enforcement of Foreign Arbitral Awards, Convention on, 772: public policy defense to enforcement under, *JD*, 132-3
- Recueil des Cours de l'Académie de Droit International de La Haye, 1976, Vol. V, *BR*, 251; 1980, Vols. I-IV, *BR*, 254

- Reform of Lawmaking in the United Nations: The Human Rights Instance, *Ed.*, 664
- Refugees, Protocol Relating to the Status of (1967), 119, 744, 746
- Registration of Objects Launched into Outer Space, Convention on (1975), 163-4
- Ehnquist, William H., 121: on act of state doctrine, 90
- Reisman, W. Michael. *BR* of Willis, 200; *BR* of Zoller, 1082; *Corr.* on 1984 *Ed.* by, 114; Nicaraguan situation and 1984 *Ed.* by, 659
- Reisner, Ralph, & Michael Gruson (eds.). Sovereign Lending: Managing Legal Risk, *BR*, 826
- Remiro Brotons, Antonio. Derecho Internacional Público. I, Principios fundamentales, *BR*, 470
- Rendell, Robert S. *BR* of Gruson & Reisner, 826
- (ed.). International Financial Law (2d ed.), 2 vols., *BR*, 822
- Representation of States in their Relations with International Organizations of a Universal Character, Convention on (1975), 758
- Reservations: Australian, to Covenant on Civil and Political Rights, 633; to human rights treaties and Inter-American Court, 13-4, 17, 20-5; to ICJ optional clause, 376-8, 382-3; *Ed.*, 385; 424, 427, 440, 445-6, 683; Libyan, to Vienna Convention on Diplomatic Relations, 648; to Racial Discrimination Convention, 295, 304, 315-6; and US understandings on Genocide Convention, 118, 127-9
- Ress, Georg, Gerhard Lüke & Michael R. Will (eds.). Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Léontin-Jean Constantinesco, *BR*, 1111
- Restatement of the Foreign Relations Law of the United States (Revised), 737, 772-3: act of state doctrine in, *LA*, 68; *Corr.* on, 717; draft articles on compensation for expropriation, 414, 421; on human rights violations under customary law, 160-1
- Restatement (Second) of the Foreign Relations Law of the United States, 421: on foreign compulsion defense, 739-40
- (The) Return of Humpty-Dumpty: Foreign Relations Law after the Chadha Case, *LA*, 912
- Riesenfeld, Stefan A., 588: *BR* of Nash, 265
- Rigaldies, Francis, & Daniel Turp (eds.). Documents juridiques internationaux, *BR*, 855
- Righini, Marilou M. *BR* of Rigaldies & Turp, and of Crawford & Flint, 855
- Riphagen, Willem, 769
- Ristau, Bruno A. *BR* of Hague Conference on Private International Law, Practical Handbook, 824
- Robinson, Davis R., 414, 540: and act of state doctrine, 78, 81-2; *Corr.* on US withdrawal from *Nicaragua* case, 423; 658; notification of US withdrawal from *Nicaragua* case, 438-9
- , David A. Colson & Bruce C. Rashkow. Some Perspectives on Adjudicating before the World Court: The Gulf of Maine Case, *LA*, 578
- Rode, Zvonko R. *BR* of Ballarino, 217
- Rogers, William D. *BR* of Bator, 847
- Röhm, Eberhard H. *BR* of Burdeau, 831
- Roosevelt, Franklin D., and the legislative veto, 919-20
- Root, Elihu, and PCIJ's Optional Clause, 33-4, 35
- Rosenne, Shabtai, 654, 1031: Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice, *BR*, 186
- Rossi, Christopher R. *See* Weston, Burns H.
- Rowan, Richard L., & Duncan C. Campbell. Multinational Enterprises and the OECD Industrial Relations Guidelines, *BR*, 231
- Rowles, James P. *BR* of Buergenthal, Norris & Shelton, 813
- Rubin, Alfred P., 103: *BR* of Dale, 1097; *BR* of Recueil des Cours de l'Académie de Droit International de La Haye, 1976, Vol. V, 251; 1980, Vols. I-IV, *BR*, 254; Professor D'Amato's Concept of American Jurisdiction Is Seriously Mistaken, *Ag.*, 105; reply by D'Amato, 112
- Rubin, Seymour J. *BR* of Jackson, Louis & Matsushita, 509
- , & Thomas R. Graham (eds.). Managing Trade Relations in the 1980s: Issues Involved in the GATT Ministerial Meeting of 1982, *BR*, 1089
- Rubio Torrano, Enrique. *See* Corriente Córdoba, José A.
- Ruda, José María, and *Nicaragua* case, 373, 445, 1006
- Ruddy, Frank S. (ed.). American International Law Cases, 1969-1978, Vols. 21-28, *BR*, 475

- Rudzinski, Aleksander W. *BR* of Weres, 238
- Rybakov, Ju. M., B. M. Klimenko & V. F. Petrovskij (eds.). *Slovar Mezhdunarodnogo Prava* (Dictionary of International Law), *BR*, 849
- Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law, *LA*, 68
- Sacerdoti, Giorgio. *BR* of Stenberg, 513; *BR* of Thesaurus Acroasium, Vol. XII, 501
- Sakharov, Andrei, 171, 176, 178
- SALT I and II. *See* Strategic Arms Limitation Talks
- Samie, Najeeb, & Julius J. Marke (comps./eds.). *Anti-Trust and Restrictive Business Practices: International, Regional & National Regulation*, *BR*, 503
- Sandalow, Terrance, & Eric Stein (eds.). *Courts and Free Markets: Perspectives from the United States and Europe*, 2 vols., *BR*, 225
- Sanders, Pieter (ed.). *Yearbook Commercial Arbitration*, Vol. IX—1984, *BR*, 1129
- San Francisco Conference (1945), 374, 425, 1027
- Saudi Arabia, 409, 413. *See also* Arab states
- Scelle, Georges, 980
- Schachter, Oscar, 676: *Ag. by Mendelson on 1984 Ed. by on compensation*, 414; *response by Schachter, Ag.*, 420; *Corr. by Mendelson on*, 1041; *Corr. on 1984 Ed. by on use of force*, 114; *correction to*, 721; and *deep seabed mining*, 702–3; *on social ends and law*, 317; *violations of human rights and 1984 Ed. by on use of force*, 659–60
- Schechter, Michael G. *BR* of Jordan, 197
- Schermers, Henry G. *Judicial Protection in the European Communities* (3d ed.), *BN*, 271  
——— (ed.). *See* Kapteyn, P. J. G.
- Schliesser, Peter C. O. *BR* of McMichael & Paulus, 244; *BR* of Morris & Millán, 239
- Schmitthoff, Clive M., & Norbert Horn (eds.). *The Transnational Law of International Commercial Transactions*, *BR*, 229
- Schneider, Jan. *The Gulf of Maine Case: The Nature of an Equitable Result*, *LA*, 539
- Schwebel, Stephen: and *Gulf of Maine case*, 543, 574; and *Nicaragua case*, 373, 382, 442, 444, 445, 446, 566, 582, 1006, 1009, 1010–1, 1013–4, 1015, 1017–8, 1019–25, 1027–8, 1032–3
- Schwelb, Egon, on *Racial Discrimination Convention*, 293
- Seara Vázquez, Modesto. *Derecho y Política en el Espacio Cósmico*, *BR*, 262
- Selected Articles from Chinese Yearbook of International Law, *BR*, 851
- Self-defense: collective, and *Nicaragua case*, 375, 379, 380, 422, 429–30, 439, 440–1, 657–8, 1032, 1034; and *diplomatic immunity*, 646–7; and *economic coercion*, 408–12
- Self-determination, 310: and *the use of force*, 659; *Corr. on*, 114
- Settlement of Investment Disputes between States and Nationals of Other States, *Convention on* (1966): and *amending FSIA*, 772, 773; *immunity under*, 320, 333, 339–40, 343–4
- Shamgar, Meir (ed.). *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects*, Vol. I, *BR*, 207
- Sharon, Ariel, 728, 730
- Shearer, I. A. *See* O'Connell, D. P.
- Shelton, Dinah, Thomas Buergenthal & Robert Norris. *Protecting Human Rights in the Americas: Selected Problems*, *BR*, 813
- Sherman, John, Edward Miles, David Fluharty, Stephen Gibbs, Shoichi Tanaka & Masao Oda. *Atlas of Marine Use in the North Pacific Region*, *BR*, 486
- Shihata, Ibrahim F. I., Said Aissi, Mehdi Ali, A. Benamara, Antonio R. Parra & T. Wohlers-Scharf (eds.). *The OPEC Fund for International Development: The Formative Years*, *BR*, 827
- Shultz, George P., 657, 1045, 1048, 1050: *letter to ICJ on its compulsory jurisdiction*, 377–8, 652. *See also* International Court of Justice, *Statute of*; *United States Department of State*
- Sigler, Jay A. *Minority Rights: A Comparative Analysis*, *BN*, 1142
- Silkenat, James R. *BR* of Akinsanya, 829
- Silva Martins, Ives Gandra da, Gilberto de Ulhôa Canto & J. van Hoorn, Jr. (eds.). *Monetary Indexation in Brazil*, *BR*, 499

- Silva Pinto, P. Corte Real da, on deep seabed mining, 697-8, 699
- Simonetti, Gilbert, Jr., Richard M. Hammer & Charles T. Crawford (eds.). *Investment Regulation Around the World*, *BR*, 223
- Simons, Thad W., Jr. *BN* of Schermers, 271; *BR* of Stewart, 1115
- Simmons, David A. *BR* of Miles, Gibbs, Fluharty, Dawson & Teeter, and of Miles, Sherman, Fluharty, Gibbs, Tanaka & Oda, 486
- Sinclair, Ian. *The Vienna Convention on the Law of Treaties* (2d ed.), *BR*, 799
- Slavery Convention (1926), 119
- Smith, Gerard, and nuclear arms negotiations with USSR, 65-6
- Sobrino Heredia, José Manuel. *La Situación regional en las Comunidades Europeas: Perspectivas para Galicia*, *BR*, 835
- Socialist countries, and restrictive theory of sovereign immunity, 345-6
- Sohn, Louis B., 421, 658; on deep seabed mining, 703, 710-1
- , & Kristen Gustafson. *The Law of the Sea in a Nutshell*, *BR*, 485; 703, 710
- Somali Democratic Republic (SDR), 895: immunity of governmental agency in US courts, *JD*, 749-51
- Some Perspectives on Adjudicating before the World Court: The Gulf of Maine Case, *LA*, 578
- South Africa, 403, 651: decision to appear before ICJ, 998-1001; and UN Sub-Commission on Minorities, 170, 171, 176
- South African Yearbook of International Law, Vol. 7, 1981, & Vol. 8, 1982, *BR*, 856
- Sovereign immunity, 95: and commercial acts, *JD*, 143-5; and economic development, *LA*, 319; and Executive's conduct of foreign affairs, 76-7; ILC progress on codification, 755, 762-6. *See also* United States: Foreign Sovereign Immunities Act
- Soviet bloc. *See* Eastern bloc
- Space law: drafting of UN treaties, 672, 676; entry into force of Moon Treaty, *CD*, 163; resource rights and ownership under, 701-2
- Spain, 602, 607, 620, 666: governmental agency and immunity in France, 328-9
- Special Missions, Convention on (1969), 758
- Spencer, John H. Ethiopia at Bay: A Personal Account of the Haile Sellassie Years, *BR*, 790
- Spitzbergen, rights to mining and sovereignty, 705-12
- "(A) Springboard for the Future": A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice, *LA*, 28
- Sri Lanka, and UN Sub-Commission on Minorities, 176, 179
- START. *See* Strategic Arms Reduction Talks
- State responsibility: if accessory to wrongful acts, 85-6; and damage to marine environment, 349, 350, 351, 357, 365-7, 370, 371; ILC progress on codification, 755, 769-70
- States of Emergency: Their Impact on Human Rights, *BR*, 1104
- Stein, Eric, & Terrance Sandalow (eds.). *Courts and Free Markets: Perspectives from the United States and Europe*, 2 vols., *BR*, 225
- Stein, Ted L., *NC* in memory of, 1036
- Stein, Torsten. *Die Auslieferungsausnahme bei politische Delikten: Normative Grenzen, Anwendung in der Praxis und Versuch einer Neuformulierung*, *BR*, 843
- Steinberger, Helmut. *See* Bernhardt, Rudolf
- Stenberg, Harald. *Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten: Tendenzen und Wandel der völkerrechtlichen Ordnung wirtschaftlicher Beziehungen zwischen den Staaten*, *BR*, 513
- Stephen, N. M., on implementation of treaties in Australia, 628
- Stern, Herbert J. Judgment in Berlin, *BR*, 480
- Stevenson, John R., on the package deal, 875
- Stewart, Stephen M. International Copyright and Neighbouring Rights, *BR*, 1115
- Stockholm Conference on the Human Environment (1972), on protection of marine environment, 349-50, 371
- Stohl, Michael, & George A. Lopez (eds.). *The State as Terrorist: The Dynamics of Governmental Violence and Repression*, *BR*, 479
- Stone, Julius: on power of UN General Assembly, 699-700; and use of force, 409, 410-1, 412; *Visions of World Order: Between State Power and Human Justice*, *BR*, 1084

- Story, Joseph, 109, 112: on relationship between positive law and natural law, 107
- Strategic Arms Limitation Talks (US-USSR, SALT I and II), the process and the lawyer, *LA*, 52
- Strategic Arms Reduction Talks (US-USSR, START), the process and the lawyer, *LA*, 52
- Sucharitkul, Sompong, 762
- Sufrin, B. E., M. P. Furmston & R. Kerridge (eds.). *The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights*, *BR*, 199
- Suriname, and the package deal, 878
- Suter, Keith. *BR of Pryles & Iwasaki*, 838; *An International Law of Guerrilla Warfare: The Global Politics of Law-Making*, *BR*, 206
- Swann, Dennis. *Competition and Industrial Policy in the European Community*, *BR*, 836
- Sweden, 124: court on sovereign immunity, 340-1
- Swiss Bankers' Association, proposed agreement on judicial assistance to US, 726-8
- Switzerland, 131: as host to US-USSR nuclear arms negotiations, 54; measures to facilitate judicial assistance to US, *CP*, 722-8; and PCIJ's Optional Clause, 42, 43, 44; sovereign immunity rules, 337, 340
- Szafarz, Renata. *Sukcesja państw w odniesieniu do traktatów we współczesnym prawie międzynarodowym* (Succession of States in Respect of Treaties in Contemporary International Law), *BR*, 235
- Szawlowski, Richard. *BR of Góralczyk*, 794; *BR of Klimenko, Petrovskij & Rybakov*, 849; correction to 1984 *BR of Voelkerrecht. Lehrbuch*, 274
- Sztucki, Jerzy. *Interim Measures in the Hague Court: An Attempt at a Scrutiny*, *BR*, 190; *Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The "Salvadoran Incident," NC*, 1005
- Taft, William Howard, on US mining rights in Spitzbergen, 706, 709, 710
- Talks on the Limitation and Reduction of Intermediate-Range Nuclear Forces (US-USSR, INF), the process and the lawyer, *LA*, 52
- Tanaka, Shoichi, Edward Miles, John Sherman, David Fluharty, Stephen Gibbs & Masao Oda. *Atlas of Marine Use in the North Pacific Region*, *BR*, 486
- Tarullo, Daniel K. *BR of Rubin & Graham*, 1089
- Tate letter (1952), 457, 742
- Teclaff, Ludwik A. *BR of Experiences in the Development and Management of International River and Lake Basins*, 811
- Teeter, David, Edward Miles, Stephen Gibbs, David Fluharty & Christine Dawson. *The Management of Marine Regions: The North Pacific*, *BR*, 486
- Territorial sea. *See* Law of the sea
- Territorial sovereignty, 641: rights to continental shelf beyond territorial sea in federal system, *JD*, 139-41. *See also* Spitzbergen
- Terrorism: and diplomatic immunities, 643, 646, 649, 651, 762; and political offense exception in UK-US treaty, *CP*, 1045-7
- Tesón, Fernando R. *BR of Anuario Argentino de derecho internacional*, Vol. I, 1983, 259
- Tezcan, Durmus. *Territorialité et conflits de juridictions en droit pénal international*, *BR*, 514
- Thesaurus Acroasium, Vol. XII, *BR*, 501
- Theutenberg, Bo Johnson. *The Evolution of the Law of the Sea: A Study of Resources and Strategy with Special Regard to the Polar Regions*, *BR*, 1127
- Thiam, Doudou, 755
- Third World, 164, 381, 404, 655, 1045: and Cuba's LOS policy, 893-4, 897, 898, 902, 903, 904, 905, 908, 910. *See also* Developing countries; New International Economic Order
- (The) XIII International Congress on Penal Law, *CD*, 180
- (The) Thirty-sixth Session of the International Law Commission, *CD*, 755
- Thomas, A. J., Jr., & Ann Van Wynen Thomas, 411
- Title and Use (and Usufruct)—An Ancient Distinction Too Oft Forgotten, *NC*, 689
- Toepke, Utz. *EEC Competition Law: Business Issues and Legal Principles in Common Market Antitrust Cases*, *BR*, 837

- Torras de la Luz, Pelegrín, 900, 902, 904, 907, 909
- Torrey Canyon* oil spill, 349, 368-9
- Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention Against (1984), 680
- Transnational corporations, 907, 908
- Treaties: and act of state doctrine in US, 73; and Community law in Italy, 599-601, 604, 606-11, 616-8, 620, 621; FCN, employment preferences under, *JD*, 740-2; implementation of in Australia, *LA*, 622; private right of action under, *JD*, 1067-9; subject to Inter-American Court's advisory jurisdiction, 2, 3, 4-8, 11, 12, 18, 20; taking of resources and ownership under, 694-5; and third states, 872-3, 879-82, 889, 1040; and US acceptance of ICJ jurisdiction, *NC*, 682. *See also* Human Rights; Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings; Reservations; Vandenberg reservation
- Treaty of Paris (1920), 705, 706-7, 708, 709-10, 711, 712
- Treaty of Rome (establishing the EEC, 1957), and Italian law, 599, 607, 609-11, 615, 616, 618
- Treaty of Utrecht (1713), 694
- Treaty of Versailles, compensation under, 417
- Treves, Tullio. *BR* of Canto, Martins & van Hoorn, 499; *La Convenzione delle Nazioni Unite sul diritto del mare* del 10 dicembre 1982, *BR*, 249
- (ed.). *Lo Sfruttamento dei fondi marini internazionali*, *BR*, 249
- Trindade, Antônio Augusto Cançado. *Repertório da Prática Brasileira do Direito Internacional Público*, 3 vols., *BR*, 1131
- Trinidad and Tobago, 904, 908
- Truman, Harry S, 116, 682, 683; and the legislative veto, 920, 921
- Truman Proclamation (1945), 552, 569, 579, 979
- Turkey, 131
- Turp, Daniel, & Francis Rigaldies (eds.). *Documents juridiques internationaux*, *BR*, 855
- Union of Soviet Socialist Republics, 403, 405, 406, 661, 747, 748; and Cuba's LOS policy, 893-5, 897, 898-900, 902, 907, 909, 910; and double standard in UN, 714-5; governmental agency and US immunity rules, 329-30; and ICJ jurisdiction and admissibility, 383-4, 386, 395, 401; immunity from US citizen's suit, *JD*, 1057-8; members on ILC, *Corr.*, 720; and Moon Treaty, 163, 167, 168; nuclear arms negotiations with US, *LA*, 52; and the package deal, 877; and UN Sub-Commission on Minorities, 171, 176-7, 178
- United Kingdom, 399, 694, 1018-9, 1020: Court on act of state doctrine, 88-9; Court on immunity of embassy bank accounts, *JD*, 143-5; dissolution of injunction halting suit in US court, *JD*, 141-3; 1070; and ICJ's compulsory jurisdiction, 387, 388, 395-6, 440; implementation of treaties in, 622; and nuclear arms negotiations, 52, 54; recent abuses of diplomatic privileges and immunities in, *Ed.*, 641; 757; role in shaping PCIJ's Optional Clause, *LA*, 28; scrutiny of parliamentary delegation of power, 938; State Immunity Act, 320, 323, 324, 335, 336, 448, 766, 774, 779; Supplementary Extradition Treaty with US, *CP*, 1045-7; US court on deployment of missiles in, *JD*, 746-9; US courts' antitrust jurisdiction and, *JD*, 1069-71; US enforcement of arbitral award in, *JD*, 132-3
- United Nations Charter, 375, 399-400, 423, 429, 446, 658, 664, 699-700, 748: action related to Genocide Convention under, 125; Art. 2(4) and economic coercion, 408-13; Art. 2(4) and self-determination, 659; *Corr.* on, 114; as basis for intervention before ICJ, 1014, 1018-21, 1023, 1028; El Salvador and admissibility of *Nicaragua* case under, 1032-5; impact on US courts, 159; lawmaking under, 667; private right of action under, 1057-8; ratification by Nicaragua and ICJ compulsory jurisdiction, 374, 382, 424-7, 443, 653
- United Nations Commission on Human Rights: the 1984 session of the Sub-Commission on Discrimination and Protection of Minorities, *CD*, 168; *Corr.* on, 1040; and Sub-Commission on Minorities, lawmaking by, 666-70, 672, 676, 677, 679; Sub-Commission on Minorities and Racial Discrimination Convention, 284
- United Nations Commission on International Trade Law (UNCITRAL), 316-7: lawmaking by, 672-3, 676, 678, 680



- United Nations Committee on the Elimination of Racial Discrimination, 680: views on the Convention, 285, 287, 290-1, 292-3, 297, 298, 300-3, 304-5, 309-10, 312-5
- United Nations Committee on the Peaceful Uses of Outer Space, 572, 680
- United Nations Conference on the Law of the Sea (1958), 347, 553, 885
- (Third) United Nations Conference on the Law of the Sea: Cuba's role at, *LA*, 891; and *Gulf of Maine* case, 553, 575, 584, 587, 588; and the package deal, 873-8, 882-3, 884-9; and protection of marine environment, 348, 352, 361, 363. *See also* Law of the sea: UN Convention
- United Nations Conference on Trade and Development (UNCTAD), 897
- United Nations Convention on the Law of the Sea. *See* Law of the sea
- United Nations Economic and Social Council (ECOSOC), 169-70, 172, 174, 177, 284; and "gross" violations of human rights, 632, 669; lawmaking by, 667-70, 677, 679
- United Nations Educational, Scientific and Cultural Organization (UNESCO), 637, 945: World Heritage List, 633
- United Nations Environment Programme (UNEP), regional agreements on marine environment, 349, 371
- United Nations General Assembly, 399: Declaration on Principles concerning Friendly Relations, 406, 411, 412; Definition of Aggression, 410-1, 412, 413, 755; lawmaking by, 667, 671, 672, 673-4, 676, 677, 678, 679; Legal Committee on jurisdiction under Genocide Convention, 123-4; and the seabed, 696-700, 702, 703, 713, 714, 873-4
- United Nations Human Rights Centre, 173, 177-8, 679
- United Nations Human Rights Committee, 301, 680
- United Nations Human Rights Law Commission (UNHRLC), proposal to create, 676-81
- United Nations Secretariat, and lawmaking, 672, 673, 674, 676, 677-9
- United Nations Secretary-General, 682, 684: and human rights in Poland, 716-7; and UN lawmaking, 667-9, 680, 681
- United Nations Security Council, 402, 664: and *Nicaragua* case, 375, 399-400, 423, 429-30, 446, 658, 1003; permanent members and ICJ optional clause, 395-6, 401, 440
- United States
- act of state doctrine in revised *Restatement of foreign relations law*, *LA*, 68; *Corr. on*, 717
- Agreement on East Coast Fishery Resources with Canada, 543, 553, 556, 560, 563, 565, 568, 577, 579-80, 963
- agreement with Cuba for return of boatlifted nationals, *CP*, 431-2; Cuban suspension of operation of, *CP*, 1044-5
- Alien Tort Claims Act, 747, 748: causes of action under, 95, 96-8, 100, 104-5, 106-8, 1068, 1069; exceptions to sovereign immunity under, *JD*, 1065-7
- Civil Aviation Agreement with El Salvador (1982), 738-9
- Consumer Product Safety Act, 943
- and Cuba's LOS policy, 892-3, 894, 897, 899, 901, 902, 903-4, 905-6, 907-8, 909, 910-1
- Deep Seabed Hard Mineral Resources Act (1980), rights claimed under, 689-90, 691, 692, 696, 701, 703, 704-5, 712
- Defense Production Act (1950), 924
- Department of Defense Appropriation Authorization Act (1974), and the legislative veto, 923; the 1984 Act, 950
- Department of State Authorization Act (1982), 945-6
- Diplomatic Relations Act (1978), 1052: liability insurance requirement, 777
- exchange on LOS policy, *CD*, 151
- Export Administration Act (1979), 950, 1055: application of beyond expiry, *JD*, 460-2
- Extradition Treaty with Haiti (1905), 744, 746
- Extradition Treaty with UK (1972), Supplementary Treaty, *CP*, 1045-7
- Federal Arbitration Act (1925), and federal courts' power to stay foreign proceedings, *JD*, 133-5
- Federal Rules of Civil Procedure, 456, 735, 746, 775, 937, 1068
- Federal Rules of Criminal Procedure, and taking evidence abroad in criminal cases, 130-1
- Fishermen's Protective Act (1967), Japanese whaling and Pelly Amendment to, *CP*, 434-8

- Fishery Conservation and Management Act (1976), 546; Japanese whaling and Packwood-Magnuson Amendment to, *CP*, 434-8
- Foreign Assistance Act (1961), 119; and the legislative veto, 924, 936, 948, 949, 957; the 1964 Act, 69
- Foreign Corrupt Practices Act (1977), employer violation prerequisite for prosecution of employee, *JD*, 452-4
- Foreign Missions Act (1982), 1050-1, 1052; 1983 Amendments, 1047, 1052
- Foreign Relations Authorization Act (1979), 942-3
- foreign relations law, delegation of powers under, *LA*, 912
- Foreign Sovereign Immunities Act (1976), 77, 764; applicability to defaulted Polish treasury notes, *JD*, 742-4; commercial activity exception, *JD*, 447-9; 1054; and economic development activities, 320, 321, 323, 324-8, 329-30, 335, 336; execution of judgments under, *JD*, 447-9; exceptions to immunity under, *JD*, 1065-7; implied waivers of immunity under, *JD*, 1057-9; personal jurisdiction under, *JD*, 749-51; proposed amendment of, *CD*, 770; retroactive application of, *JD*, 456-8; and suits by alien plaintiffs against foreign sovereigns, *JD*, 1059-60
- Immigration and Nationality Act (1952), 744, 745, 913-4, 1045, 1064
- and implementation of treaties, 622, 623, 640
- International Emergency Economic Powers Act (1977), President's authority to preclude judicial review under, *JD*, 460-2
- International Security Assistance and Arms Export Control Act (1976), and the legislative veto, 932-3, 947
- and joining League of Nations and PCIJ, 29, 33-4, 35, 46-8
- Legislative Appropriations Act (1932), and legislative veto, 918, 919
- and Moon Treaty, 163, 166, 167-8
- Mutual Security Treaty with Republic of China, President's power to terminate, 685-7
- Neutrality Act, 928
- nuclear arms negotiations with USSR, *LA*, 52
- and the package deal at UNCLOS III, 874-7, 878, 886, 1038, 1039-40
- Port Safety and Tank Vessel Safety Act (1978), and LOS Convention, 157
- and Racial Discrimination Convention, 284-5, 295, 298-9, 315
- Railway Labor Act, and subsequent executive agreement, 738-9
- Refugee Act (1980), 744, 745, 746
- Reorganization Acts (1939, 1949, 1977), and legislative veto, 919-20, 930
- rules on taking evidence abroad in criminal cases, *CP*, 129-31
- Securities Exchange Act (1934), 722
- Ship Mortgage Act (1920), 779
- support of Genocide Convention by Senate and State Department, *CP*, 116-29
- Trade and Tariff Act (1984), and Israeli-US free trade area agreement, 729, 730, 731
- Trade Expansion Act (1962), and the legislative veto, 926
- Treaty Concerning Pacific Salmon with Canada (1985), signing and provisions of, *CP*, 432-4
- Treaty of Amity, Economic Relations, and Consular Rights with Iran (1955), 419, 776
- Treaty of Friendship, Commerce and Navigation with Greece (1951), employment preference under and discrimination laws, *JD*, 740-2
- Treaty of Friendship, Commerce and Navigation with Nicaragua (1956), and ICJ jurisdiction in *Nicaragua* case, 373, 383, 424, 428-9, 442, 444-5, 655-6
- Treaty of Peace with Great Britain (1783), and East Coast fishing, 578-9
- Treaty on Mutual Assistance in Criminal Matters with Switzerland (1977), measures to improve cooperation under, *CP*, 722-8
- Treaty to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area (1979), 568, 579-80, 591; Special Agreement under, 543-4, 556, 565, 566, 573, 580, 583-5, 593, 970, 976
- on UN human rights lawmaking, 666, 670
- Uniform Commercial Code, on choice of law, 752-3
- and UN Sub-Commission on Minorities, 171, 176-7

- War Powers Resolution: consultation requirement, 940, 941; judicial review of, 955-6; legislative veto and, 921, 927, 949; proposed amendment, 944, 945, 950, 952  
*See also* Law of the sea: Canada-US maritime boundary delimitation; Nicaragua
- United States Agency for International Development (AID), immunity of foreign states participating in program of, *JD*, 749-51
- United States Arms Control and Disarmament Agency, and nuclear arms negotiations with USSR, 55, 56, 61, 66
- United States Central Intelligence Agency, 909, 956: consultations with Congress, 940-1
- United States Coast Guard, 587, 589: interdiction of visaless aliens on high seas, *JD*, 744-6
- United States Congress, 750: and act of state doctrine, 69-72, 75, 78, 90; and amending FSIA, 772, 776, 778-81, 783; intent re judicial review of export licensing, 461-2; intent re retroactivity of FSIA, 457-8; intent re sovereign's immunity to execution, 448; intent re waivers of immunity under FSIA, 1058; and the legislative veto, *LA*, 912; and nuclear arms negotiations with USSR, 63-4; suit by members on missile deployment in UK, *JD*, 746-9. *See also* United States Senate
- United States Constitution, 449-50, 745-6, 780: compensation standard, 416; and foreign expropriation decrees, 74-5, 76, 83-5; and Genocide Convention, 118, 119, 121, 122-3, 126-7; and Italian Constitution, 607, 613, 616, 621; and the legislative veto, 915, 916-7, 918, 919, 921, 924, 925-30, 938-9, 942, 959; linking human rights study with courses on, *CD*, 158; and political question doctrine, *JD*, 746-9; 958, 1061-2; and presidential authority to preclude judicial review, *JD*, 460-2; and President's modification of ICJ jurisdiction, *NC*, 682; and Racial Discrimination Convention, 294-5, 298; whether foreign expropriation of land constitutes a taking under, *JD*, 135-7; *JD*, 1060-3
- United States Consumer Product Safety Commission, 937
- United States Court of Claims, and US responsibility for taking by foreign government, *JD*, 135-7; *JD*, 1060-3
- United States Court of International Trade, on domestic subsidies and countervailing duties on imports, *JD*, 137-9
- United States Department of Commerce, 587, 589: judicial review of export licensing decisions, *JD*, 460-2; policy on Japan's observation of whaling quotas, *CP*, 434-8
- United States Department of Defense, 589: deprivation of property in foreign territory and political question doctrine, *JD*, 449-52; and the legislative veto, 926; and nuclear arms negotiations with USSR, 55, 60, 61, 66
- United States Department of Justice, 438, 456, 587, 589: Attorney General and deportation, 914, 915; and judicial assistance from Switzerland, 723, 725, 726; on President's treaty powers, 687, 688
- United States Department of State, 658, 662: on acquisition of real property by foreign missions, *CP*, 1050-1; and act of state doctrine, 72, 73, 77-8, 81-2, 90; and employment of foreign nationals, 741; on establishment of consular posts, *CP*, 1051-3; and *Gulf of Maine* case, 540, 558, 576-7, 587-8; on insurance requirements for foreign missions, *CP*, 1047-8; intervention in sovereign immunity cases, *JD*, 456-8; 458-60; on Israeli-US free trade area agreement, 728; and nuclear arms negotiations with USSR, 55, 58, 61; on President's power to make agreements involving monetary awards, 684; on President's treaty powers, 687-8; procedures re renunciation of citizenship, *JD*, 1063-5; response to experts on US LOS policy, 155-6; and Spitzbergen mining, 706, 708, 709, 710; statements on ICJ decision in *Nicaragua* case, 423-30, 439-41, 992, 1001, 1002-3; statements on Genocide Convention, 116-8, 122, 127-8; statements on withdrawal from *Nicaragua* case, 379-80, 423; *CP*, 438-41; 446, 992, 1000-1; and Supplementary Extradition Treaty with UK, *CP*, 1045-7; on traffic offenses of foreign mission personnel, *CP*, 1048-50
- United States Department of the Interior, 589
- United States Department of the Treasury, Iranian Assets Control Regulations (1979), 754
- United States House of Representatives. *See* United States Congress
- United States Immigration and Naturalization Service, 744, 913
- United States International Trade Administration (ITA), rule on countervailing duties on imports, *JD*, 137-9
- United States International Trade Commission, 732, 926

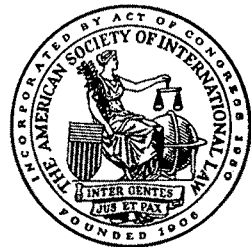
- United States Joint Chiefs of Staff, and nuclear arms negotiations with USSR, 55, 60, 61  
 United States National Security Council (NSC), and nuclear arms negotiations with USSR, 61-2  
 United States Navy, 587  
 United States President, 84-5: authority to modify ICJ jurisdiction, *NC*, 682; authority to preclude judicial review, *JD*, 460-2; authority to suspend entry of aliens, 744-5; and the legislative veto, *LA*, 912; and nuclear arms negotiations with USSR, 53-4, 55, 61-2, 63-4.  
*See also* Reagan, Ronald  
 United States Securities and Exchange Commission (SEC), and taking of evidence in Switzerland, *CP*, 722-8  
 United States Senate, 390-1, 426: committee support for and report on Genocide Convention, *CP*, 116-29; and maritime boundary delimitation with Canada, 544, 580; and US acceptance of ICJ jurisdiction, 682-9. *See also* United States Congress  
 United States Supreme Court, 94, 134, 405, 452, 616, 744, 935, 944: and act of state doctrine, 68-80, 83-5, 86, 88-90, 718-20, 958; discrimination decisions, 291, 294-5; and employment discrimination under FCN treaty, 741-2; on jurisdiction under FSIA, 779-81; and the legislative veto, 912, 913-5, 916-7, 923, 925-6, 929-30, 932, 951, 959; and political questions, 952-3; on President's power to terminate treaties, 685-6  
 United States Trade Representative, and Israeli-US free trade area agreement, *CP*, 728-32  
 United States-Germany Mixed Claims Commission, 417  
 United States-Panama General Claims Commission, 418  
 Universal Declaration of Human Rights, 670, 744, 746, 1066, 1071: Inter-American Court's jurisdiction to interpret, 8; and Racial Discrimination Convention, 290, 294, 299-300  
 Uribe Vargas, Diego. La tercera generación de Derechos Humanos y la Paz, *BR*, 493  
 Uschakow, Alexander. Integration in RGW (COMECON): Dokumente, *BR*, 1132  
 Usher, John A. European Court Practice, *BR*, 1102  
 U.S.-USSR Nuclear Arms Negotiations: The Process and the Lawyer, *LA*, 52  
 Utton, Albert E. *BR* of Chauhan, 192
- Vagts, Detlev. *BN* of Bernhardt & Beyerlin, 271  
 van Boven, Theo C. *Corr.* on human rights and double standard at UN, 714  
 Vandenberg reservation, 378, 394, 652, 654-5  
 van Hamel, Joost-Adrian, and PCIJ's Optional Clause, 38  
 van Hoorn, J., Jr., Gilberto de Ulhôa Canto & Ives Gandra da Silva Martins (eds.). Monetary Indexation in Brazil, *BR*, 499  
 Venezuela, 898, 906, 1059  
 Vienna Convention on Consular Relations (1963), 679, 758  
 Vienna Convention on Diplomatic Relations (1961), 679: and ILC work on diplomatic courier and bag, 758, 760, 761; violations of, 642-3, 644-51, 757, 1049  
 Vienna Convention on the Law of Treaties (1969), 654, 679, 688, 877: and Court's interpretation of American Convention on Human Rights, 18-9, 20-3; and Racial Discrimination Convention, 285, 294; and third states, 879-80, 883-4  
 Vietnam, Democratic People's Republic of, and the package deal, 878  
 Vietnam War, 941, 945, 955: US courts on legality of, 954  
 Voelkerrecht. Lehrbuch, correction to 1984 *BR* of, 274  
 Voice of America, Radio Martí broadcasts, 1044, 1045  
 von Mehren, Robert B. *BR* of Hammer, Simonetti & Crawford, 223  
 von Schönfeld, Ulrich. Die Staatenimmunität im amerikanischen und englischen Recht, *BR*, 796  
 Voskuil, C. C. A., & J. A. Wade (eds.). Hague-Zagreb Essays 4: On the Law of International Trade, *BR*, 511
- Wade, J. A., & C. C. A. Voskuil (eds.). Hague-Zagreb Essays 4: On the Law of International Trade, *BR*, 511

- Wadegaonkar, Damodar. *The Orbit of Space Law*, *BR*, 1116
- Wagner, Wolfgang, Marion Gräfin Dönhoff, Gerhard Fels, Karl Kaiser & Paul Noack (eds.). *Die Internationale Politik 1979-1980*, *BR*, 524
- Wagner-Silva Tarouca, Beatrice. *Der Urheberrechtsschutz der ausübenden Künstler und der Tonträgerproduzenten in den USA*, *BN*, 272
- Waldock, Humphrey, 377
- Wallace, Don, Jr. *BR* of Rendell, 822
- Warnke, Allan E. *BR* of IV Jornadas de Profesores de Derecho Internacional y Relaciones Internacionales, of Corriente Córdoba, of Anuario de Derecho Internacional, Vol. IV, of El Derecho Internacional en los Congresos Ordinarios, of Anuario Mexicano de Relaciones Internacionales, and of Seara Vázquez, 262
- Warsaw Pact, 379, 440, 895
- Watercourses, international, ILC 36th session on, 755, 767-9
- Webster-Ashburton Treaty (US-UK, 1842), extradition of Confederate raiders under, 109-10
- Weiler, Joseph H. H. *Control of Foreign Policy in Western Democracies: A Comparative Study of Parliamentary Foreign Affairs Committees. Vol. II: The Transnational Setting: The European Parliament and its Foreign Affairs Committees*, *BR*, 267
- Weiss, Edith Brown. *BR* of Trindade, 1131
- Wells, Donald A. *War Crimes and Laws of War*, *BR*, 202
- Weres, Leszek. *Teoria Gier w Amerykańskiej Nauce o Stosunkach Międzynarodowych (Theory of Games in the American Science on International Relations)*, *BR*, 238
- Weston, Burns H. (ed.), with the assistance of Thomas A. Hawbaker & Christopher R. Rossi. *Toward Nuclear Disarmament and Global Security: A Search for Alternatives*, *BR*, 203
- White, Byron R.: on act of state doctrine, 89, 90, 718; dissent on the legislative veto, 914, 934, 936-7, 950-1
- Wilcox, Francis O. *BR* of *Control of Foreign Policy in Western Democracies: A Comparative Study of Parliamentary Foreign Affairs Committees*, 3 vols., 267
- Will, Michael R., Gerhard Lüke & Georg Ress (eds.). *Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Léontin-Jean Constantinesco*, *BR*, 1111
- Willems, J. C. M., J. L. M. Elders, A. C. Eyffinger, Chr. Gellinek & B. Kwiatkowska. *Hugo Grotius, 1583-1983*, *BN*, 1141
- Williams, Anne M. *BR* of Wolf & Arnold, 847
- Williams, Glanville L., edition of Salmond on property rights, 693-4
- Willis, James F. *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, *BR*, 200
- Wilson, Ronald D., on implementation of treaties in Australia, 631, 633, 635
- Wilson, Woodrow: and intervention in foreign states, 660, 661; and the legislative veto, 917-8
- Wohlens-Scharf, T. *See* Shihata, Ibrahim F. I.
- Wolf, Maurice, & Elting Arnold. *Doing Business with the International Development Organizations in Washington*, *BR*, 847
- Women, Inter-American Convention on the Granting of Political Rights to, 119
- Women, Convention on the Political Rights of, 119
- World Bank. *See* International Bank for Reconstruction and Development
- World Cultural and Natural Heritage, Convention for the Protection of (1972), and Australian aboriginal sites, 633-40
- Yankov, Alexander, 755, 758
- Yemen, South, 895
- Zoffie, David B. *Power and Protectionism: Strategies of the Newly Industrializing Countries*, *BR*, 498
- Yugoslavia, 1018
- Zung, Agnes (comp./ed.). *Commercial, Business and Trade Laws: Hong Kong*, Binder I, *BR*, 504

- Zacklin, Ralph. *BR* of Furmston, Kerridge & Sufrin, 199
- Zagaris, Bruce. *BR* of Lawrence, 518
- Zamora, Stephen. *BR* of Effros, 224
- Zhukov, Gennady, & Yuri Kolosov. International Space Law, *BR*, 218
- Ziegel, Jacob S., & William C. Graham (eds.). New Dimensions in International Trade Law: A Canadian Perspective, *BR*, 500
- Zoller, Elisabeth. *BR* of Sinclair, 799; Peacetime Unilateral Remedies: An Analysis of Countermeasures, *BR*, 1082

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CONTENTS

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[No. 1, January 1985, pp. 1-282; No. 2, April 1985, pp. 283-537;  
No. 3, July 1985, pp. 539-869; No. 4, October 1985, pp. 871-1185.]

	PAGE
<b>The Advisory Practice of the Inter-American Human Rights Court</b> <span style="float: right;"><i>Thomas Buergenthal</i></span>	1
<b>"A Springboard for the Future": A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice</b> <span style="float: right;"><i>Lorna Lloyd</i></span>	28
<b>U.S.-USSR Nuclear Arms Negotiations: The Process and the Lawyer</b> <span style="float: right;"><i>John H. McNeill</i></span>	52
<b>Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law</b> <span style="float: right;"><i>Malvina Halberstam</i></span>	68
<b>The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination</b> <span style="float: right;"><i>Theodor Meron</i></span>	283
<b>Economic Development and Sovereign Immunity</b> <span style="float: right;"><i>Georges R. Delaume</i></span>	319
<b>Marine Pollution under the Law of the Sea Convention</b> <span style="float: right;"><i>Alan E. Boyle</i></span>	347
<b>The First ICJ Chamber Experiment</b>	
<b>The Gulf of Maine Case: The Nature of an Equitable Result</b> <span style="float: right;"><i>Jan Schneider</i></span>	539
<b>Some Perspectives on Adjudicating before the World Court: The Gulf of Maine Case</b> <span style="float: right;"><i>Davis R. Robinson, David A. Colson &amp; Bruce C. Rashkow</i></span>	578
<b>New International Law in National Systems</b>	
<b>Community Law, International Law and the Italian Constitution</b> <span style="float: right;"><i>Antonio La Pergola &amp; Patrick Del Duca</i></span>	598
<b>Federalism and the International Legal Order: Recent Developments in Australia</b> <span style="float: right;"><i>Andrew Byrnes &amp; Hilary Charlesworth</i></span>	622
<b>Perspectives on the New Law of the Sea</b>	
<b>Progressive Development of International Law and the Package Deal</b> <span style="float: right;"><i>Hugo Caminos &amp; Michael R. Molitor</i></span>	871
<b>Functionalism and the Balance of Interests in the Law of the Sea: Cuba's Role</b> <span style="float: right;"><i>Alberto R. Coll</i></span>	891
<b>The Return of Humpty-Dumpty: Foreign Relations Law after the Chadha Case</b> <span style="float: right;"><i>Thomas M. Franck &amp; Clifford A. Bob</i></span>	912
<b>From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case</b> <span style="float: right;"><i>L. H. Legault &amp; Blair Hankey</i></span>	961
<b>Editorial Comments</b>	
<b>Nicaragua v. United States: Jurisdiction and Admissibility</b> <span style="float: right;"><i>Herbert W. Briggs</i></span>	373

Icy Day at the ICJ	<i>Thomas M. Franck</i>	379
Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court	<i>Anthony D'Amato</i>	385
Political and Economic Coercion in Contemporary International Law	<i>Tom J. Farer</i>	405
The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience	<i>Rosalyn Higgins</i>	641
<i>Nicaragua v. United States</i> as a Precedent	<i>Frederic L. Kirgis, Jr.</i>	652
<i>Nicaragua</i> and International Law: The "Academic" and the "Real"	<i>Anthony D'Amato</i>	657
Reform of Lawmaking in the United Nations: The Human Rights Instance	<i>Theodor Meron</i>	664

### Agora

#### What Does Tel-Oren Tell Lawyers?

Judge Bork's Concept of the Law of Nations Is Seriously Mistaken	<i>Anthony D'Amato</i>	92
Professor D'Amato's Concept of American Jurisdiction Is Seriously Mistaken	<i>Alfred P. Rubin</i>	105
Professor Rubin's Reply Does Not Live up to Its Title	<i>Anthony D'Amato</i>	112

#### What Price Expropriation?

Compensation for Expropriation: The Case Law	<i>M. H. Mendelson</i>	414
Compensation Cases—Leading and Misleading	<i>Oscar Schachter</i>	420

### Notes and Comments

<i>Nicaragua v. United States</i> : Constitutionality of U.S. Modification of ICJ Jurisdiction	<i>Michael J. Glennon</i>	682
Title and Use (and Usufruct)—An Ancient Distinction Too Oft Forgotten	<i>L. F. E. Goldie</i>	689
The Francis Deák Prize		720
Litigation Implications of the U.S. Withdrawal from the <i>Nicaragua</i> Case	<i>Keith Highet</i>	992
Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The "Salvadoran Incident"	<i>Jerzy Sztucki</i>	1005
In Memoriam: Professor Ted L. Stein (1952–1985)	<i>Jonathan I. Charney</i>	1036
		114, 423, 714, 1037

### Correspondence

Observations by the U.S. Department of State on the ICJ's November 26, 1984 Judgment		423
--	--	-----

### Contemporary Practice of the United States Relating to International Law

<i>Marian Nash Leigh</i>	116, 431, 722, 1044
--------------------------	---------------------

### Judicial Decisions

<i>Monroe Leigh</i>	132, 442, 733, 1054
---------------------	---------------------

### Current Developments

Exchange between Expert Panel and Reagan Administration Officials on Non-Seabed-Mining Provisions of LOS Treaty		151
Linkages between International Human Rights and U.S. Constitutional Law	<i>Richard B. Lillich &amp; Hurst Hannum</i>	158
The Moon Treaty Enters into Force	<i>Carl Q. Christol</i>	163

The 1984 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities	<i>Larry Garber &amp; Courtney M. O'Connor</i>	168
The XIII International Congress on Penal Law	<i>M. Cherif Bassiouni</i>	180
The Thirty-sixth Session of the International Law Commission	<i>Stephen C. McCaffrey</i>	755
Proposed Amendment of the Foreign Sovereign Immunities Act	<i>Timothy B. Ahteson &amp; Stephen D. Ramsey</i>	770
The Paris Minimum Standards of Human Rights Norms in a State of Emergency	<i>Richard B. Lillich</i>	1072
<b>Book Reviews and Notes</b>	<i>Edited by Leo Gross</i>	182, 463, 790, 1082
<b>Books Received</b>		275, 531, 863, 1143
<b>International Legal Materials.</b> Contents, Vol. XXIII, Nos. 5-6 (1984); Vol. XXIV, Nos. 1-4 (1985)		280, 536, 868, 1148
<b>Table of Cases</b>		1151
<b>Index</b>		1155

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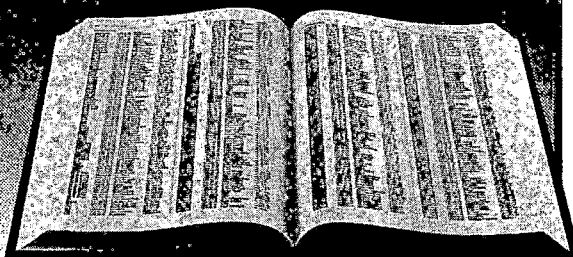
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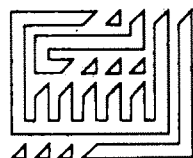
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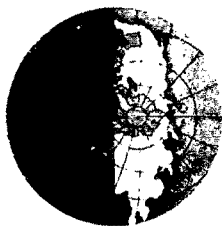
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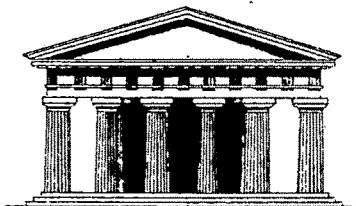
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